# EIGHTY-SECOND SESSION

***In re* Saunders (No. 18)**

THE ADMINISTRATIVE TRIBUNAL,

Considering the eighteenth complaint filed by Mr. Yann Harris Saunders against the International Telecommunication Union (ITU) on 9 July 1996 and corrected on 17 July 1996;

Considering that by a letter of 21 September 1996 the complainant informed the Registrar of the Tribunal that he wished to withdraw suit and that the Union, when invited by the Registrar to comment, declined to do so;

Considering that suit is unreservedly withdrawn;

## DECISION

The withdrawal of suit is hereby recorded.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Michel Gentot, Vice-President, and Mr. Edilbert Razafindralambo, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 30 January 1997.

Wm Douglas

**WILLIAM DOUGLAS**

**MICHEL GENTOT**

**E. RAZAFINDRALAMBO**

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

A.B. Gardner

**A.B. GARDNER**

# Judgments of the Administrative Tribunal of the International Labour Organization:

## 82nd Session

(November 1996 - January 1997)

International Labour Office
Geneva

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The Administrative Tribunal of the International Labour Organization (ILO) is competent to hear complaints against:

International Labour Organization, including the International Training Center

World Health Organization (WHO), including the Pan American Health Organization (PAHO)

United Nations Educational, Scientific and Cultural Organization (UNESCO)

International Telecommunication Union (ITU)

World Meteorological Organization (WMO)

Food and Agriculture Organization of the United Nations (FAO)

European Organization for Nuclear Research (CERN)

General Agreement on Tariffs and Trade (GATT)

International Atomic Energy Agency (IAEA)

World Intellectual Property Organization (WIPO)

European Organization for Safety of Air Navigation (Eurocontrol)

Universal Postal Union (UPU)

European Patent Organisation (EPO)

European Southern Observatory (ESO)

Intergovernmental Council of Copper-Exporting Countries (CIPEC)

European Free Trade Association (EFTA)

Inter-Parliamentary Union (IPU)

European Molecular Biology Laboratory (EMBL)

World Tourism Organization (WTO)

African Training and Research Centre in Administration for Development (CAFRAD)

Intergovernmental Organisation for International Carriage by Rail (OTIF)

International Center for the Registration of Serials (CIEPS)

International Office of Epizootics (OIE)

United Nations Industrial Development Organization (UNIDO)

International Criminal Police Organization (INTERPOL)

International Fund for Agricultural Development (IFAD)

International Union for the Protection of New Varieties of Plants (UPOV)

Customs Co-operation Council (CCC)

Court of Justice of the European Free Trade Association (EFTA Court)

Surveillance Authority of the European Free Trade Association (ESA)

International Service for National Agricultural Research (ISNAR)

Organisation internationale du Travail
*Tribunal administratif*

International Labour Organization
*Administrative Tribunal*

## EIGHTY-SECOND SESSION

**Gill v. IAEA (No. 3)**
**(Application for review)**

**Judgment 1561**

THE ADMINISTRATIVE TRIBUNAL,

Considering the application filed for review of Judgment 1478 by Mrs. Nirmal Gill on 26 April 1996 and corrected on 20 May 1996;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Articles 7, paragraph 2, and 15 of its Rules;

Having examined the written submissions;

### CONSIDERATIONS

1. The complainant used to be an official of the International Atomic Energy Agency (IAEA). This is an application from her for review of Judgment 1478, which the Tribunal delivered on 1 February 1996 and in which it dismissed her first complaint against the Agency. That judgment ruled that she was not entitled under Rule 4.06.6 of the Provisional Staff Rules to payment by the Agency of an end-of-service allowance. It rejected her plea that paragraph (B)(iii) of the rule was unlawful for being in breach of a recommendation by the International Civil Service Commission. The Tribunal's rulings thus turned on issues of law.

2. The Tribunal declared in Judgment 442 (*in re* de Villegas No. 4) and has since often confirmed that it will decline to review a judgment on the grounds — among others — of an alleged mistake of law or omission to comment on pleas submitted by either of the parties. Omission to take account of some particular fact is an admissible plea for review, but it can succeed only if the omission is such as to affect the ruling.

3. The complainant contends that the Tribunal "omitted to take account of the material facts, evidence and pleadings" that she had submitted in her complaint and in her rejoinder. She believes that the Tribunal was "looking not at the original submissions but rather at a fictitious set of briefs". In accordance with Article 15 of the Tribunal's Rules she asks it to "ascertain the authenticity of the four briefs that were provided" to it.

4. Although her pleas are admissible insofar as she is alleging the disregard of material facts, the Tribunal is quite satisfied that all the pleadings and evidence that were before it in the original proceedings were authentic. It will therefore make no order under Article 15.

5. Insofar as the complainant is pleading that the Tribunal omitted to take up her arguments in support of her complaint, the plea is inadmissible.

6. Insofar as she is alleging that the Tribunal committed mistakes of law in reaching its conclusions on the merits of her case, her plea is again inadmissible.

7. The Tribunal declined to entertain the Agency's objections to receivability because her complaint failed on the merits anyway. So her arguments about receivability are irrelevant.

8. Since the application for review is clearly irreceivable or devoid of merit it must be summarily dismissed under Article 7(2) of the Rules.

## DECISION

For the above reasons,

The application is dismissed.

**In witness of this judgment Sir William Douglas, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.**

**Delivered in public in Geneva on 30 January 1997.**

Wm Douglas

**WILLIAM DOUGLAS**

Mella Carroll

**MELLA CARROLL**

**MARK FERNANDO**

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

**A.B. GARDNER**

# EIGHTY-SECOND SESSION

## Gill v. IAEA (No. 4)
## (Application for review)

## Judgment 1562

THE ADMINISTRATIVE TRIBUNAL,

Considering the application for review of Judgment 1479 filed by Mrs. Nirmal Gill on 26 April 1996 and corrected on 20 May 1996;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Articles 7, paragraph 2, and 15 of its Rules;

Having examined the written submissions;

### CONSIDERATIONS

1. The complainant used to be on the staff of the International Atomic Energy Agency (IAEA). This is an application from her for review of Judgment 1479, which the Tribunal delivered on 1 February 1996 and in which it dismissed her second complaint against the Agency. It rejected her claim to an award of damages on account of a letter the Agency had written on 17 November 1993 to the United Nations Industrial Development Organization (UNIDO), which by then was employing her, seeking its help in recovery of a sum of several hundred dollars it had advanced to her in 1990.

2. The Tribunal declared in Judgment 442 (*in re* de Villegas No. 4) and has since often confirmed that it will decline to review a judgment on the grounds — among others — of an alleged mistake of law or omission to comment on pleas submitted by either of the parties. Omission to take account of some particular fact is an admissible plea for review, but it can succeed only if the omission is such as to affect the ruling.

3. The applicant contends that the Tribunal "omitted to take account of the material facts, evidence and pleadings" that she had submitted in her complaint and in her rejoinder. She believes that the Tribunal was "looking not at the original submissions but rather at a fictitious set of briefs". In accordance with Article 15 of the Tribunal's Rules she asks it to "ascertain the authenticity of the four briefs that were provided" to it.

4. Although the applicant's pleas are admissible insofar as she is alleging the disregard of material facts, the Tribunal is quite satisfied that all the pleadings and evidence that were before it in the original proceedings were authentic. It will therefore make no order under Article 15.

5. Insofar as the applicant is pleading that the Tribunal omitted to take up her arguments in support of her complaint, the plea is inadmissible.

6. The applicant alleged in her original complaint that the letter dated 17 November 1993 had been written to discredit her and blight her career and had caused her loss of employment and other material and moral injury.

7. The judgment set out in full the evidence on the circumstances in which the letter dated 17 November 1993 came to be written. The Tribunal was satisfied on that evidence that the officials who dealt with the matter honestly believed that she had been informed of the Agency's claim to reimbursement. Her allegation that the letter imputed dishonesty to her was unfounded. There was no evidence to suggest that anyone would have had any reason for wanting to "discredit" her or "blight her career", and her allegation of conspiracy against her by officials of the Agency was unsupported by any evidence. Her own version of the facts contradicts her statement that the letter of 17 November 1993 caused her to lose her employment: she stated in her rejoinder that it was on 4 November 1993 that UNIDO had taken its decision not to extend her contract. Moreover, apart from informing her of the Agency's letter UNIDO took no steps to recover the amount claimed and she failed to show that she had suffered any injury by reason of the letter.

8. The conclusion is that there is no basis whatever for her allegation that the Tribunal failed to take account of material facts and evidence.

9. Since the application for review is clearly irreceivable or devoid of merit it must be summarily dismissed under Article 7(2) of the Rules.

## DECISION

For the above reasons,

The application is dismissed.

**In witness of this judgment Sir William Douglas, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.**

**Delivered in public in Geneva on 30 January 1997.**

Wm Douglas

**WILLIAM DOUGLAS**

Mella Carroll

**MELLA CARROLL**

**MARK FERNANDO**

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

**A.B. GARDNER**

Organisation internationale du Travail
*Tribunal administratif*

International Labour Organization
*Administrative Tribunal*

# EIGHTY-SECOND SESSION

## Gill v. UNIDO (No. 2)
## (Application for review)

## Judgment 1563

THE ADMINISTRATIVE TRIBUNAL,

Considering the application for review of Judgment 1480 filed by Mrs. Nirmal Gill on 26 April 1996 and corrected on 20 May 1996;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Articles 7, paragraph 2, and 15 of its Rules;

Having examined the written submissions;

### CONSIDERATIONS

1. The complainant used to be an employee of the United Nations Industrial Development Organization. This is an application from her for review of Judgment 1480, which the Tribunal delivered on 1 February 1996 on a complaint she had lodged against the Organization. That judgment ruled her complaint irreceivable insofar as she was challenging the non-renewal of her appointment: she had failed to comply with the procedure set out in Staff Rule 112.02 and so to exhaust her internal means of redress, as Article VII(1) of the Tribunal's Statute required. The Tribunal also rejected her plea that she should have her contract renewed to the end of 1994 in fulfilment of a promise which she said a senior officer of the Organization had given her.

2. The Tribunal declared in Judgment 442 (*in re* de Villegas No. 4) and has since often confirmed that it would decline to review a judgment on the grounds — among others — of an alleged mistake in its appraisal of facts or omission to comment on pleas submitted by either of the parties. Omission to take account of some particular fact is an admissible plea for review, but it can succeed only if the omission is such as to affect the ruling.

3. The complainant contends that the Tribunal "omitted to take account of the material facts, evidence and pleadings" that she had submitted in her complaint and in her rejoinder. She believes that the Tribunal was "looking not at the original submissions but rather at a fictitious set of briefs". In

accordance with Article 15 of the Tribunal's Rules she asks it to "ascertain the authenticity of the four briefs that were provided" to it.

4. Although the complainant's pleas are admissible insofar as she is alleging the disregard of material facts, the Tribunal is quite satisfied that all the pleadings and evidence that were before it in the original proceedings were authentic. It will therefore make no order under Article 15.

5. Insofar as the complainant is pleading that the Tribunal omitted to take up her arguments in support of her complaint, the plea is inadmissible.

6. The complainant refers to parts of the case records which relate to her own version of a meeting she had with the Chief of Personnel Administration of UNIDO on 4 November 1993 and at which the subject of her private debts came up. She cites subsequent memoranda and other documents in support of her plea that she was informed at that date that her appointment would not be renewed. In Judgment 1480 the Tribunal accepted the evidence adduced by the Organization that the decision was notified to her on 24 November 1993 and that she received a "personnel payroll clearance form" on 29 November. There was no omission to consider any particular fact and the Tribunal reached its conclusion on all the evidence before it. The plea fails.

7. As for the alleged promise that her appointment would continue until the end of 1994, the Tribunal concluded on the evidence and for the reasons stated in the judgment that she had been made no such promise. She is challenging that conclusion on the grounds of misappraisal of the evidence. Since such grounds do not constitute an admissible plea for review the plea again fails.

8. Since the application for review is clearly irreceivable or devoid of merit it must be summarily dismissed under Article 7(2) of the Rules.

## DECISION

For the above reasons,

The application is dismissed.

**In witness of this judgment Sir William Douglas, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.**

**Delivered in public in Geneva on 30 January 1997.**

Wm Douglas

**WILLIAM DOUGLAS**

Mella Carroll

**MELLA CARROLL**

**MARK FERNANDO**

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

A.B. Gardner

**A.B. GARDNER**

Organisation internationale du Travail
*Tribunal administratif*

International Labour Organization
*Administrative Tribunal*

## EIGHTY-SECOND SESSION

***In re* Malhotra (Kashmiri Lal) (No. 5)** **Judgment 1564**

THE ADMINISTRATIVE TRIBUNAL,

Considering the fifth complaint filed by Mr. Kashmiri Lal Malhotra against the World Health Organization (WHO) on 21 November 1995, the WHO's reply of 26 February 1996, the complainant's rejoinder of 21 March and the Organization's surrejoinder of 25 June 1996;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, an Indian born in 1936, was on the staff of the WHO's Regional Office for South East Asia (SEARO), at New Delhi, from January 1964 until 31 January 1996 when he retired. Information relevant to this case appears under A in Judgment 1372 on his first complaint. Like that complaint this one is about his unsuccessful application in 1990 for a post, No. 5.0343, for an assistant at grade ND.7. The successful candidate was Mr. V.K. Malhotra.

In execution of Judgment 1372 the Administration disclosed to the regional Board of Appeal the record of the ad hoc selection committee's deliberations. In a report dated 18 January 1995 the Board recommended allowing the complainant's appeal but the Regional Director rejected its recommendation by a letter of 15 February 1995. The complainant then went to the headquarters Board. In a report of 4 October 1995 it recommended rejection. By a letter dated 27 October 1995, which the complainant is impugning, the Director-General told him of the rejection of his claims.

B. The complainant submits that the appointment of Mr. V.K. Malhotra to the post was unlawful. The Administration failed to follow the proper procedure of selection and discriminated against him. He pleads breach of Staff

Regulation 4.2 on standards of recruitment and Staff Rule 410.4 on competitions.

He seeks the quashing of the decision to appoint his namesake to post 5.0343; his own retroactive appointment to it; awards of 50,000 United States dollars in moral damages and $5,000 in costs and "any other cost to compensate" him.

C. In its reply the WHO denies the complainant's allegations and contends that the impugned decision complied with the rules, practice and case law. Recommendations by the regional Board of Appeal are not binding. The Director-General's decision not to promote the complainant is a discretionary one that shows no fatal flaw.

D. In his rejoinder the complainant seeks to refute the Administration's reply, relying mainly on the report of the regional Board, whose findings the WHO has, he says, not seen fit "to consider or contradict".

E. In its surrejoinder the Organization answers several arguments in the rejoinder and maintains that there was nothing improper about the challenged decision.

## CONSIDERATIONS

1. In Judgment 1372 the Tribunal sent the complainant's case back to the Organization so that its regional Board and, if need be, its headquarters Board of Appeal might take up his appeal anew. The Organization was to make available to the boards the full records of the ad hoc selection committee's proceedings. The Tribunal held that only from those documents could it be determined whether the complainant was right in contending that the committee had improperly "stretched" the short list to favour the successful candidate, that it had not given due weight to seniority, performance and experience in comparing the complainant with that candidate and that one of its members had dissented.

2. In its report dated 18 January 1995 the regional Board stated that the committee's minutes disclosed bias against the complainant and breach of Staff Rules 1230.1.1 (personal prejudice on the part of the Administration), 1230.1.2 (incomplete consideration of the facts), 1230.1.3 (failure to observe and apply correctly the provisions of the Staff Regulations and Staff Rules) and the procedures for recruitment to the General Service category of staff. The Board found that the complainant ranked first in seniority and his namesake seventh; thought it illogical to place the "cut-off" point so as to include over

half the candidates; and considered it strange that the selection committee should have recommended two candidates. The Board recommended such "corrective steps" as the Regional Director should "deem fit". But the Regional Director disagreed with the Board's conclusions and dismissed the appeal in a letter of 15 February 1995.

3. The headquarters Board, to which the complainant then appealed, found evidence neither of personal prejudice against him on the part of the Administration, nor of incomplete consideration of the facts, nor of improper application of Staff Regulations and Staff Rules in the selection process. On the strength of the headquarters Board's findings the Director-General dismissed his appeal in a letter of 27 October 1995.

4. Contending that his seniority was not given due consideration, the complainant points out that at the time of the selection he had served for 26 years as a secretary while the selected candidate had completed only 5 years as such. But his plea is mistaken. Under the "factor rating system" that the Organization used for short-listing inside candidates seniority was only one of several relevant factors. The system allowed up to 35 points for seniority, 40 for the quality of performance, 16 for education and 9 for experience, to make a maximum total of 100. The selection committee rated the complainant's performance below that of seven other candidates. Moreover, under the rules it was not required to recommend the candidate with the top mark, the system being no more than a tool to facilitate short-listing. According to Staff Regulation 4.2:

> "The paramount consideration in the appointment, transfer or promotion of the staff shall be the necessity of securing the highest standards of efficiency, competence and integrity. ..."

So in emphasising the complainant's seniority the regional Board failed to take into consideration the other relevant factors of selection.

5. The complainant argues that the short list was stretched to include the candidate who proved successful. The answer to that lies in clause 3 of the factor rating system:

> "The Ad Hoc Selection Committee will select its own cut off point in arriving at a short list for each vacancy ... taking into consideration the 'clustering' of candidates when such occurs."

That is just what the committee did in this instance.

6. The complainant pleads breach of former Manual provision I.3.340, which stipulated:

> "Before a meeting of a selection committee, all applications are reviewed by the unit concerned and a short list of those candidates who seem to be the most suitable for the post is drawn up."

He maintains that that was not done. He is mistaken. The administrative officer to the Regional Director reviewed the applications of all 14 candidates on behalf of the "receiving unit", and the necessary documents were provided to the selection committee three days before it met. Having taken 60 points for the "cut-off", the committee compared seven candidates on merit. There is no rule that says that the receiving unit should short-list no more than three candidates; nor is there any to prevent the committee from recommending two candidates for appointment as it did in this case. Nor was there any dissenting statement by any member of the committee.

7. Lastly, the complainant submits that he should be allowed to see all the documents of the selection committee. Judgment 1372 explained under 11 and 12 for what reasons the regional and headquarters Boards should be able to review such documents and what the purpose of such review should be. But it stated no requirement that such confidential documents should always be disclosed to the complainant, and there is none.

8. The firm case law has it that the Tribunal will not interfere with the comparison of entrants in a competition. Only when it appears that the choice of candidate may rest on some mistake of fact or law or there may have been misuse of authority will the Tribunal order the production of evidence so that it may review such comparison and will the complainant be entitled to see such evidence. In the instant case the review of the selection procedure reveals neither a breach of the Organization's Staff Regulations or other rules, nor any mistake of fact or law, nor misuse of authority.

## DECISION

For the above reasons,

The complaint is dismissed.

**In witness of this judgment Sir William Douglas, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.**

**Delivered in public in Geneva on 30 January 1997.**

W Douglas

**WILLIAM DOUGLAS**

Mella Carroll

**MELLA CARROLL**

**MARK FERNANDO**

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

A.B. Gardner

**A.B. GARDNER**

## EIGHTY-SECOND SESSION

***In re* Malhotra (Kashmiri Lal) (No. 6)** **Judgment 1565**

THE ADMINISTRATIVE TRIBUNAL,

Considering the sixth complaint filed by Mr. Kashmiri Lal Malhotra against the World Health Organization (WHO) on 15 April 1996, the WHO's reply of 19 July, the complainant's rejoinder of 12 August and the Organization's surrejoinder of 19 September 1996;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant served on the staff of the Organization's Regional Office for South East Asia (SEARO), at New Delhi, from January 1964 until 31 January 1996, when he retired. He entered a competition to fill a post, No. 5.1519, for a programme assistant at grade ND.7. Another internal candidate, Mr. S.K. Madanpotra, having been appointed to the post, he appealed in October 1992 against the outcome of the competition.

Judgment 1372 ruled on his first complaint, which was about another competition. In it the Tribunal declared that the regional and headquarters Boards of Appeal should have access to the full records of the selection committee's proceedings. Having decided to apply that ruling to the appeal about post 5.1519 too, the Administration sent the regional Board documents which it had not had at its disposal at its original hearing of the case, and invited it to report again.

In its second report, dated 12 April 1995, the regional Board held that the process of selection had been flawed, and it recommended granting the complainant promotion to grade ND.7 as from the date at which the successful candidate had been promoted to that grade. By a letter of 25 May 1995 the Regional Director rejected his appeal. He then went to the headquarters Board, which, on 12 February 1996, recommended rejection. In a letter of 28 March 1996, the decision he is now impugning, the Director-General endorsed the Board's recommendation.

B. The complainant submits that the selection of another candidate was unlawful. He has three main pleas: bias, failure to take account of material facts and breach of the rules on selection.

He seeks the quashing of the decision to appoint Mr. Madanpotra to post 5.1519, his own retroactive appointment to it, awards of 50,000 United States dollars in moral damages and $5,000 in costs, and "any other costs to compensate" him.

C. In its reply the WHO denies the charges and contends that the impugned decision complied with its rules, practice and the case law.

D. In his rejoinder the complainant disputes several points of law and of fact in the reply.

E. In its surrejoinder the Organization discusses substantive issues raised in the rejoinder and presses its earlier pleas.

## CONSIDERATIONS

1. In 1964 the complainant joined the General Service category of staff of the WHO's Regional Office for South East Asia in New Delhi. His grade was then ND.4. He was later promoted within his category. On 1 December 1994 his post was reclassified ND.7 and he was promoted to that grade. He retired on 31 January 1996.

2. In September 1992, when his post and grade were still at ND.6, he applied for a post at ND.7, No. 5.1519, for a programme assistant. He was not selected. He appealed to the regional Board of Appeal in October 1992. His appeal was dismissed by the Regional Director and he went to the headquarters Board of Appeal. Before that Board heard his appeal the Tribunal delivered Judgment 1372, which is summed up in A above. Consequently the case was again submitted to the regional Board for reconsideration so that it might have before it the record of the ad hoc selection committee's proceedings.

3. In its report dated 12 April 1995 the regional Board found no evidence to support the complainant's allegations that the Administration had shown him personal prejudice for his having served for several years as a staff representative on the Regional Classification Committee, on the committee of the Staff Association and on the regional Board of

Appeal. In regard to his objections to the composition of the selection committee, the Board considered that the absence of a representative of the Staff Association had been an irregularity, but it stopped short of saying that on that account no selection at all could be made. It observed that the "interviewing officer" had put a staff member at grade ND.6 on the short list though doubting his eligibility. The Board could find no reason why the committee had preferred that staff member to the complainant, who had over seven years' more experience and was just as well qualified, or why it had not put the complainant on the list, even though he too was considered to be of "doubtful" eligibility. It pointed out that there were five candidates with greater seniority and experience than the successful one. It concluded that the complainant, having a greater number of years of service and "being an active staff member with good knowledge of rules, etc. ought to have been the next appropriate choice"; that "an error of fact and arbitrariness [had] crept into the selection"; and that there had been incomplete consideration of the facts within the meaning of Rule 1230.1.2 and failure to apply correctly the provisions of the Staff Regulations and Staff Rules within the meaning of Rule 1230.1.3. So it recommended promoting the complainant to grade ND.7 as from the date at which the successful candidate had himself had such promotion.

4. In a letter of 25 May 1995 to the complainant the Regional Director rejected the recommendation and, as required, gave reasons for doing so. He said that the Board had "focused on the seniority of the applicants" and on the complainant's exclusion from the short list and had seen such exclusion as an error. On that score he observed that it was entirely within the interviewing officer's discretion, provided he acted from no improper motive, to decide who was to be put on the list. The Regional Director found no evidence of failure to consider any essential fact of relevance to the complainant's candidature or to observe and apply "the correct interview and short listing procedures".

5. The complainant appealed on 29 June 1995 to the headquarters Board. In its report of 12 February 1996 that Board agreed that there was no evidence of personal prejudice against the complainant. But neither did it find evidence of failure to respect proper procedures. It expressed the view that, "while seniority was an important factor in selection for a post, it could not be considered as the sole criterion", and that the selection committee had not been unlawfully constituted. It recommended rejecting

the appeal. By a letter dated 28 March 1996 the Director-General informed the complainant that he did so, and that is the decision he is impugning.

6. The complainant contends that as the candidate with the longest service he should have been included on the short list; that the selection committee was not properly constituted; and that he should have been given "a chance for computer testing".

7. The Recruitment and Selection Procedures, which replaced the factor rating system as from January 1991, require that the short list comprise not fewer than three and not more than five candidates, including "at least one qualified staff member with the longest service in the grade of the post or one grade below". The complainant contends that his entire period of service, in which he was sometimes at higher grades than were other candidates, should be taken into account. But according to the rules the only relevant periods of service are either at the grade of the vacant post, here ND.7, or at one grade below, here ND.6. He was in the same position as two other candidates, one of whom was assessed as "unsuitable" and the other, who was short listed, was assessed, like the complainant, as being of "doubtful" eligibility but had a marginally higher score in the rating exercise. Thus the omission of the complainant from the short list was justified.

8. The complainant argues that since it was unlawful to have no staff representative on the selection committee its recommendation too was unlawful. The committee "normally" consists of five members, including the president of the Staff Association or his nominee. It is true that, though invited by letter to attend the meeting of the selection committee, the president failed, in pursuance of the Staff Association's policy, both to attend and to send a nominee in his stead. But since the provisions on the membership of the committee are not binding, and if no staff representative chooses to attend, that cannot have the effect of invalidating its recommendations.

9. The complainant further pleads in his original brief that he was deprived of "a chance for computer testing" because the electricity was cut off at the very moment when he was to be tested and the equipment would not work. He says that the interviewing officer promised to call him back for the purpose when power was restored but failed to do so. In his rejoinder he explains that it was because of the power failure that he was unable to complete the test and that he so informed the interviewing officer. It was not before the regional Board of Appeal but only before the

headquarters Board that he raised this issue. For its part the Organization states that the complainant did take the computer test but was unable to complete some parts of it satisfactorily and that he was given a mark of only 7 out of 15. On the pleadings and evidence before it the Tribunal cannot accept either that the complainant had no opportunity at all to take the computer test or that he was not allowed to complete it.

10. In Judgment 1137 (*in re* West No. 11) — to cite but one — the Tribunal declared -

> "Only on the limited grounds often stated in the case law will the Tribunal interfere with discretionary decisions such as one to promote an official. Such grounds are lack of authority, a formal or procedural flaw, disregard of an essential fact, a mistaken deduction from the evidence, a mistake of fact or law, and abuse of authority."

Unless it finds a flaw of that kind the Tribunal will not interfere in the comparison of candidates in a competition and in the exercise of discretion by the Regional Director. The complainant having failed to prove any such flaw, his complaint must fail.

## DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 30 January 1997.

Wm Douglas

WILLIAM DOUGLAS

Mella Carroll

MELLA CARROLL

MARK FERNANDO

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

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## EIGHTY-SECOND SESSION

**_In re_ Vollering (No. 7)** **Judgment 1566**

THE ADMINISTRATIVE TRIBUNAL,

Considering the seventh complaint filed by Mr. Johannes Petrus Geertruda Vollering against the European Patent Organisation (EPO) on 18 September 1995, the EPO's reply of 15 December, the complainant's rejoinder of 27 March 1996 and the Organisation's surrejoinder of 25 April 1996;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a Dutchman, is employed by the European Patent Office, the EPO's secretariat, as a patent examiner in its Search Directorate (DG1) at The Hague.

After taking part in a one-day strike of staff in October 1992 he had his salary and allowances docked by one-thirtieth in February 1993. On 14 May 1993 he appealed against that deduction, as indeed he had against a similar one that led to a complaint the Tribunal dismissed on 31 January 1994 in Judgment 1333 (*in re* Franks No. 2 and Vollering No. 2).

In a report dated 13 March 1995 the Appeals Committee recommended rejecting his appeal of 14 May 1993. By a letter of 20 April 1995 the Director of Staff Policy informed him of the President's decision to endorse the Committee's recommendation. But he took issue with that decision in a letter of 9 May 1995 and asked the President in the event of rejection to treat it as another appeal.

By a letter of 20 June 1995, which he impugns, the Director of Staff Policy informed him that the Administration would not "answer on matters which have been sufficiently explained to you during several legal proceedings".

B. The complainant refers the Tribunal to several documents he appends to his brief. They include pleadings he and other staff have filed in support of internal appeals as well as correspondence, a petition to the European Parliament and two articles by a lawyer. He takes the Appeals Committee to task for relying on Judgments 1041 (in re Lammineur) and 1333, which he sees as unsound.

He asks the Tribunal:

"1. to postpone the decision of this complaint till after a decision has been taken by the Governing Body concerning the request to bring Judgement 1333 to the ICJ for an Advisory Opinion and at least till after the November 1995 Session in which this Tribunal will decide on an other case concerning this decision of the Governing Body.

2. to declare itself not neutral to give a judgement in this complaint because of the Tribunal's involvement (and especially its members) in the Judgements 1041, 1296, 1297 and 1333.

3. to quash the decision of the EPO President, dated 20 April 1995, respectively 20 June 1995;

4. to declare that EPO allowances constitute a form of social security in accordance with higher principles of law;

5. to order repayment of all sums of money deducted from the complainant's allowances because of strike action with an added interest of 10% p.a.;

6. to declare that the methods of calculation of the deductions from the EPO allowances introduced an adverse discrimination with respect to the complainant and his family;

7. to order the award of moral damages to the complainant of 100 times the difference in payment because of the strike action, per child involved because of the discrimination introduced by these different methods of calculation;

8. to condemn the EPO for the failure of the IAC to show proper impartiality in the composition of the members of the IAC [of whom he names one] and to compensate the complainant with NLG [guilders] 5.000,00 for the moral damage suffered by this lack of impartiality of a part of the composition of the IAC;

9. to order the award of moral damages to the complainant of NLG 14.000,00 because of the illegal disciplinary sanction suffered by the complainant at the moment his social allowances were deducted following strike action;

10. to order the award of costs of NLG 40.000,00 to the complainant."

C. In its reply the EPO contends that the complaint is clearly irreceivable. The letter it impugns was not sent by or on behalf of the President and is therefore not a challengeable decision.

The Organisation's subsidiary plea is that the complaint is devoid of merit, there being no breach of the material rules on appeals and on pay.

D. In his rejoinder the complainant submits that the Tribunal's judgments have put staff and their families in a "legal and social vacuum". He wants to replace his claim (1) with a request to postpone the Tribunal's ruling "till at least after a decision has been taken by the Administrative Council of the EPO concerning the request to bring Judgment 1333 to the International Court of Justice for an Advisory Opinion" and to add a new claim (11) for payment of 5,000 guilders in moral damages on account of the letter of 20 June 1995.

E. In its surrejoinder the Organisation observes that the complainant puts forward no new material argument in his rejoinder.

## CONSIDERATIONS

1. The complainant took part in a one-day strike of EPO staff at The Hague in October 1992. The Organisation deducted one-thirtieth of his total pay, i.e. salary plus allowances, for the month of February 1993. He lodged an internal appeal on 14 May of that year against the deduction. The substantive issue of that appeal was the same as the one that the Tribunal had ruled on in Judgments 1041 (*in re* Lammineur) and 1333 (*in re* Franks No. 2 and Vollering No. 2), in which it held that the Organisation had acted properly in making deductions from the pay of EPO staff.

2. In its report of 13 March 1995 the Appeals Committee recommended rejecting the appeal on the grounds that the issue was *res judicata*, though it expressed disagreement with the Tribunal's ruling. The decision by the President of the European Patent Office to reject the appeal was communicated to the complainant by a letter dated 20 April 1995 from the Director of Staff Policy.

3. The complainant sent the President a letter on 9 May 1995 challenging that decision and the Appeals Committee's reasoning, questioning its impartiality, stating that he had written to the Governing Body of the International Labour Office to seek an advisory opinion on the matter from the International Court of Justice, and asking for support from the President for that request. He invited the President to state that the

Appeals Committee had been wrong and had "failed in its independent functioning" by giving "a biased opinion"; to acknowledge that his own decision was "vitiated by an error of law" and change it "in an appropriate manner" and to pay him 100 guilders in moral damages. If the President declined, he was to regard the letter as lodging an internal appeal under Articles 106 to 108 of the Service Regulations.

4. In a letter of 20 June 1995 the Director of Staff Policy replied that, since the Service Regulations did not allow internal appeal against the outcome of internal appeal proceedings, the internal appeal the complainant had made in his letter had "not been registered". That is the decision he is now impugning.

5. The Organisation points out that the letter of 20 June 1995 was sent neither by the President nor on his behalf. The complainant demurs, and he is right to do so. It was to the President by name that he had written on 9 May 1995; that letter was what he got in reply and he was entitled to assume that it had been sent with the President's authority. Indeed the position in law would be the same even if the reply had never been written and if he were basing his complaint on implied rejection of the claims in his letter of 9 May.

6. Assuming – as the complainant does – that the decision impugned is the one in the letter of 20 June 1995, his complaint is irreceivable. In his letter of 9 May 1995 he lodged an appeal against the decision taken on an earlier internal appeal on the grounds that the recommendation of the Appeals Committee on which that decision rested was wrong. He contends that it was in line with Articles 106 to 108 of the Service Regulations for him to put to the President a claim to a new decision. He is mistaken. Internal appeal proceedings culminate in a final decision by the President, and appeal against that decision will lie to the Tribunal in accordance with Article 109(3) of the Service Regulations and the Tribunal's own Statute. If the complainant was dissatisfied with the President's final decision his remedy was to appeal to the Tribunal: the Service Regulations do not allow internal appeal against the outcome of an internal appeal.

## DECISION

For the above reasons,

The complaint is dismissed.

**In witness of this judgment Sir William Douglas, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.**

**Delivered in public in Geneva on 30 January 1997.**

Wm Douglas

**WILLIAM DOUGLAS**

Mella Carroll

**MELLA CARROLL**

**MARK FERNANDO**

INTERNATIONAL LABOUR ORGANISATION
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**A.B. GARDNER**

## EIGHTY-SECOND SESSION

***In re* Vollering (No. 8)** **Judgment 1567**

THE ADMINISTRATIVE TRIBUNAL,

Considering the eighth complaint filed by Mr. Johannes Petrus Geertruda Vollering against the European Patent Organisation (EPO) on 1 November 1995, the EPO's reply of 22 January 1996, the complainant's rejoinder of 26 April and the Organisation's surrejoinder of 5 July 1996;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, who is Dutch, is employed by the European Patent Office, the EPO's secretariat, as a patent examiner in its Search Directorate (DG1) at The Hague. Facts with a bearing on his case are recounted in Judgments 1296 (*in re* Cook), 1297 (*in re* Theuns No. 3) and 1333 (*in re* Franks No. 2 and Vollering No. 2).

By a letter of 22 April 1993 he told the Administration that his wife was receiving child allowances (*kinderbijslag*) from the Dutch State for their three children as from October 1989. An "additional pay slip" he got for June 1993 showed that on that account the EPO had withheld 7,778.31 guilders from his pay.

By a letter of 22 September 1993 he appealed to the President of the Office. The Appeals Committee, to which the President referred his appeal, recommended rejection in its report of 30 June 1995. By a letter of 11 August 1995 the Director of Staff Policy told him that the President had decided to endorse the Committee's recommendation. That is the challenged decision.

B. The complainant submits that the EPO was wrong to rely on Article 67(2) of the Service Regulations, which requires it to deduct from any dependant's allowance paid to an employee the amount of any allowance "of like nature" paid to the employee or the employee's spouse. He insists that the Dutch child allowance and the EPO dependant's allowance are not of like nature. He also pleads discriminatory treatment and breach of the rules governing payments and the recovery of sums overpaid.

He wants the Tribunal:

> "A) to quash the decision of the President of the EPO dated 11.08.1995 which rejects the internal appeal of the complainant
>
> B) to order the EPO to pay back the deducted amounts from the complainant's remuneration because of the receival of "Kinderbijslag" by the complainant's wife with retroactive effect over the period of 89/10 - 92/12...
>
> C) to order the EPO to pay back the deducted amounts from the complainant's remuneration because of the receival of "Kinderbijslag" by the complainant's wife on a regular basis since 93/1
>
> D) to order the EPO to stop the deduction of any amounts from the complainant's remuneration because of the receival of "Kinderbijslag" by the complainant's wife
>
> E) to order the EPO to pay the complainant a 10% interest per annum on all sums of money wrongly deducted from the complainant's remuneration
>
> F) to order the EPO to pay a moral damage of NLG 10,000 to the complainant because the EPO upholds the illusion that the dependants' allowance is of like nature as the "Kinderbijslag" while in judgement 1333 (re Franks and Vollering) it is judged to be a simple pro rata payment, and for the implicit refusal of the EPO to solve the problems of its employees concerning their social security by means of for instance an agreement with the Dutch Government
>
> G) to order compensation to the complainant of NLG 10,000 for costs incurred."

C. In its reply the EPO contends that the complaint is devoid of merit. The Tribunal has already declared it lawful for the Organisation to deduct sums from the dependant's allowance when an employee or an employee's spouse receives an allowance of like nature, such as the Dutch child allowance, from another source. The EPO rebuts his other pleas.

D. In his rejoinder the complainant says that his original arguments already answer "most" of the points in the Organisation's reply.

E. In its surrejoinder the EPO maintains its earlier submissions.

## CONSIDERATIONS

1. The complainant and Mr. Steven Cook have both applied for joinder of this complaint with Mr. Cook's fourth one. The application is disallowed because the other complaint is about deductions from pay on account of participation in a strike and therefore raises different issues of law.

2. The complainant informed the Organisation on 22 April 1993 that his wife had recently applied for and been granted the *kinderbijslag*, the child's allowance paid by the Government of the Netherlands. She was accordingly

paid that allowance for three children with retroactive effect for the last three months of 1989 and for 1990, 1991 and 1992. The total came to 10,284 guilders. In June 1993 the Organisation deducted from the complainant's pay the sum of 7,778.31 guilders, the total of the amounts it had paid him in dependant's allowances for the same period. He appealed on 22 September 1993. In its report of 30 June 1995 the Appeals Committee recommended rejection and the President rejected the appeal in a letter of 11 August 1995 to the complainant, the decision he is impugning.

3. Article 67(2) of the Service Regulations reads:

> "A permanent employee in receipt of family allowances shall declare allowances of like nature paid to him, to his spouse or to his dependants from other sources; these allowances shall be deducted from those paid under these Service Regulations."

Whether the *kinderbijslag* and the dependant's allowance of the EPO are "of like nature" is an issue that the Tribunal has already ruled on, in Judgments 1296 (*in re* Cook) and 1297 (*in re* Theuns No. 3). It held therein that the essential purpose of the two allowances was the same and that none of the differences between them changed that purpose.

4. The complainant submits that the two allowances are not "of like nature" and that the Tribunal overruled Judgments 1296 and 1297 in Judgment 1333 (*in re* Franks No. 2 and Vollering No. 2) confirming 1041 (*in re* Lammineur). He is mistaken. Judgments 1041 and 1333 were about the application — in those cases in the event of strikes — of Article 65(1)b) of the Service Regulations, which says that where remuneration is not payable for a complete month the monthly amount is to be divided into thirtieths. Those judgments declared it lawful to reduce the dependant's allowance under 65(1)b) on the grounds that it was a component of remuneration under 64(2). Judgments 1296 and 1297 were about different issues: the nature of the *kinderbijslag* and the legal basis of the deduction under Article 67(2). So there is no merit in any of the complainant's arguments in support of his view that Judgment 1333 was at variance with Judgments 1296 and 1297. The rulings in 1296 and 1297 on the nature of the *kinderbijslag* hold good: it and the dependant's allowance are "of like nature".

5. Circular 82 of 19 February 1981, which the complainant cites, sets guidelines for construing Articles 67(2), on the rule of non-accumulation, and 69(3)a), on the definition of a dependant child. It provides:

"Article 67, paragraph 2
General provisions

(1) Article 67, paragraph 2, will be interpreted as meaning that allowances of like nature paid in respect of dependants are also deductible.

(2) Permanent employees must notify the Office without delay of any deductible amounts or changes in such amounts, of which they are aware.

(3) If the requirements of Article 69, paragraph 3 a), are met and the household allowance is accordingly claimed, the allowance will be paid only up to the amount by which the maintenance being paid by the employee exceeds the amount of the dependants' allowance.

Article 69 paragraph 3 a)
Dependants' allowance

(1) It will be assumed that any child resident with the permanent employee or his spouse is being mainly supported by the employee or his spouse.

(2) Any child not resident with the permanent employee or his spouse will be considered as being "mainly" supported by them if they are paying, by way of maintenance, an amount (minimum maintenance) which exceeds the dependant's allowance paid by the Office by the following amounts (personal contribution):

| | |
|---|---|
| - Grades C to B4: | DEM [German marks] 50 |
| - Grades B5 to A2: | DEM 100 |
| - the other grades: | DEM 150 |

(3) The amount by which any regular payments from third parties for the benefit of the dependant, and any regular income earned by the dependant, exceeds the amount of a dependants' allowance will be deducted from that allowance. Point 2 of the Guidelines for Article 67, paragraph 2, will apply mutatis mutandis."

6. The complainant quotes the above phrase "allowances of like nature paid in respect of dependants are also deductible" (see under "General provisions" in (1)). He takes it to mean that Article 67(2) has been changed so as to replace the words "shall be deducted" with "can be deducted". He is mistaken. Not only can a circular not amend the wording of the Service Regulations but this one does not bear the meaning he gives it. It says that allowances of like nature "are also deductible"; that is to say, they are included in the category of allowances which, according to Article 67(2), shall be deducted.

7. On the strength of that misinterpretation the complainant argues that -

> "this adaptation of the meaning of article 67 made article 67 applicable in practice: it opened the way to further specify the deductions which can be deducted and how they are deducted as is specified further on in the same circular 82."

He then cites point (3) of the circular about Article 69(3)a), "Dependants' allowance". But his reference to that point of the circular is irrelevant. Point (3) is about the reckoning of the allowance for a dependent child, a matter that is not at issue in the present case.

8. The complainant further observes that point (3) speaks of "regular payments from third parties for the benefit of the dependant". He contends that the lump-sum payments of *kinderbijslag* for the period from October 1989 to December 1992 were not "regular payments" and the EPO was therefore not free to deduct them from the sums it paid to him in dependant's allowance. His plea is again immaterial: the deduction made on account of the *kinderbijslag* came under Article 67(2), whereas the deductions referred to in that point of the circular are not the ones made under that provision.

9. It is likewise immaterial whether the amount paid in *kinderbijslag* is greater or smaller than that of the dependant's allowance. The deduction is made on the grounds that no EPO employee should at any time receive family allowances of like nature from more than one source. The purpose is to avert any risk of discrimination between members of staff, who may be stationed in any one of the countries where the EPO has offices.

10. The complainant pleads that it is unlawful to deduct the *kinderbijslag* on the grounds that it is paid not to him but to his wife. Yet Article 67(2) is quite clear on that score. His wife is his "spouse" within the meaning of the Service Regulations, and 67(2) says that where the spouse is paid a family allowance "of like nature" the amount shall be deducted from that of the allowance paid under the Service Regulations.

11. The complainant argues that the recovery of the *kinderbijslag* is not authorised under Article 88 of the Service Regulations, which reads:

> "Any sum overpaid shall be recovered if the recipient was aware that there was no due reason for the payment or if the fact of the overpayment was patently such that he could not have been unaware of it."

He observes that his wife "was not aware that the sum now recovered by the EPO (because of the retroactive payment of *kinderbijslag*) was overpaid". But Article 88 is irrelevant to the instant case. The EPO made the deduction after the complainant had declared to it the receipt by his wife of the *kinderbijslag*. The Organisation was thereupon entitled under Article 67(2) to make deductions from the amounts paid to him in dependant's allowance and it did so. This is not the sort of case envisaged by Article 88, which applies where the Organisation has overpaid an official who was or ought to have been aware that "there was no due reason for the payment". It is a case, not of overpayment by the Organisation, but of lawful deduction by it from the family allowance on account of payment of an allowance "of like nature" from another source.

12. The complainant pleads discrimination on the grounds that the Organisation has treated him differently from another staff member who is divorced. But since he is not in the same legal and factual situation as that other staff member there can be no breach of the principle of equal treatment.

13. Lastly, the complainant submits that the *kinderbijslag* is inviolable, a point that is not in dispute. But he is under the mistaken impression that it is deducted by the Organisation. It is not: the Organisation leaves intact the *kinderbijslag* as such, but reduces the amounts of its own dependant's allowance instead. It is thereby not committing any abuse of authority or breach of due process but simply applying Article 67(2).

## DECISION

For the above reasons:

The complaint is dismissed.

**In witness of this judgment Sir William Douglas, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Edilbert Razafindralambo, Judge, sign below, as do I, Allan Gardner, Registrar.**

**Delivered in public in Geneva on 30 January 1997.**

Wm Douglas

**WILLIAM DOUGLAS**

Mella Carroll

**MELLA CARROLL**

**E. RAZAFINDRALAMBO**

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

A.B. Gardner

**A.B. GARDNER**

Organisation internationale du Travail
*Tribunal administratif*

International Labour Organization
*Administrative Tribunal*

# EIGHTY-SECOND SESSION

***In re* Vollering (No. 10)** **Judgment 1568**

THE ADMINISTRATIVE TRIBUNAL,

Considering the tenth complaint filed by Mr. Johannes Petrus Geertruda Vollering against the European Patent Organisation (EPO) on 27 February 1996, the EPO's reply of 20 May, the complainant's rejoinder of 21 June and the Organisation's letter of 10 July 1996 informing the Registrar of the Tribunal that it did not wish to enter a surrejoinder;

Considering Articles II, paragraph 5, and VII, paragraph 1, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The EPO employs the complainant, a Dutchman, in the European Patent Office, its secretariat, at The Hague. He is a patent examiner in its Search Directorate (DG1). In a note of 3 April 1992 his supervisor set the target, or "norm", for his output in 1992 at 110 "files". By a note dated 17 December 1992 he told his supervisor he could not "accept" that figure and asked for conciliation. In a note of 26 August 1993 the conciliation officer informed him that though 110 was an "equitable norm" it should apply only from 1993 because of the "delay" since April 1992; for the first three months of 1992 the target would be at the rate of 100 a year and for the remaining nine at the rate of 106.5.

By a letter of 25 November 1993 the complainant asked the President of the Office to lower the target from 110 to 100 files and, if not, to treat his letter as an internal appeal. The President put his case to the Appeals Committee. In a report dated 23 October 1995 the Committee recommended rejecting it. By a letter of 12 December 1995 the Director of Staff Policy informed him that the President had endorsed the Committee's recommendation. That is the impugned decision.

B. The complainant submits that the target for his output is unlawful. It is, he says, arbitrary and in breach of the Organisation's duty to maintain standards of quality. The EPO discriminated against him by failing to make allowance for the two daily coffee breaks that a communiqué of 22 July 1992 allowed on condition that they did not interfere with work. He objects to having been transferred to another technical field on 1 January 1994 and sees that as a hidden disciplinary sanction for appealing against the target. He pleads breach of due process by the Appeals Committee.

He wants the Tribunal:

> "A) to have production norms for the technical fields based on the clear and correct calculation as is provided for in [a] note of 18 February 1992 of the Principal Director Search ...;
>
> B) to condemn the arbitrary determination of the increased production norm for [his technical field], an arbitrary determination which denied the right of the complainant to be heard and to condemn the excessive delays in treatment of this case by the Administration and to order compensation to the complainant of [10,000 guilders] for the factual and moral damage suffered by this arbitrary treatment;
>
> C) a recalculation of the production norms for the technical fields in the complainant's directorate and the one for [his technical field], based on those figures which were valid till 1992, an adaptation of these norms based on an increased workload because of additional electronic tools, working time reduction, increased paper documentation and increased complexity of the dossiers and documentation, in order to meet a correct quality standard which belongs to the duty of an examiner or a clear statement that for the purpose of an increased productivity norm, the quality can be lowered.
>
> D) to condemn the Administration of the EPO for the breach of good faith and the abuse of power because it wilfully separated [his technical field], from the complainant because the complainant filed an internal appeal against the increased norm for [his field] an action which in fact constitutes a covert disciplinary measure against the complainant and to order compensation to the complainant of [10,000 guilders] for the material and moral harm suffered by the complainant by this covert disciplinary measure.
>
> E) to condemn the EPO for the failure of the Internal Appeals Committee and therefore the breach of due process in law during the internal appeal procedure because the Internal Appeals Committee did not show a proper neutrality and did not perform a proper investigation and
>
> to order compensation to the complainant of [5,000 guilders] for the moral damage suffered by this;
>
> F) to order compensation of [10,000 guilders] for costs incurred."

C. In its reply the EPO submits that the complaint is irreceivable. The target that the complainant is objecting to had no adverse effect on him inasmuch as his rating for productivity in 1992-93 was "good". His objections to transfer in 1994 are irreceivable because he has failed to exhaust his internal remedies.

The Organisation contends that his complaint is in any event devoid of merit. The impugned decision, which is discretionary, shows none of the flaws he alleges. His criticism of the Appeals Committee is odd inasmuch as he delayed entering his own brief until the date of hearings.

D. In his rejoinder the complainant comments on several issues of fact and law in the reply.

## CONSIDERATIONS

1. The complainant is a grade A3 patent examiner at the EPO's office at The Hague. The director of division sets the number of search files each examiner must deal with to qualify for a "good" rating for output in his staff report. In doing so the director takes account of the results obtained in previous years by examiners whose output has been rated "good" in the same technical field and of comparison of results obtained by examiners in technical fields of similar complexity.

2. The complainant was informed in a note of 3 April 1992 from his supervisor that the output in his then technical field was raised as from 1 April 1992 from 100 to 110 "weighted" files over 180 "search" days. In a note of 17 December to his supervisor he asked for conciliation on the matter. On 26 August 1993 the conciliation officer confirmed the target for his output at 110 files but because of the lapse of time lowered it for the last nine months of 1992 from 110 to 106.5. His new target of 110 therefore applied only from 1 January 1993. On 25 November 1993 he filed an internal appeal against that decision asking that the target be lowered to the old figure of 100.

3. He was transferred to a new technical field as from 1 January 1994.

4. In a report of 23 October 1995 the Appeals Committee recommended rejecting his appeal. The President accepted the recommendation and so informed him in a letter of 12 December 1995, the decision he is impugning.

5. In 1992 the complainant completed 44.25 searches over 80.5 days. That was the equivalent of 93.16 over the 180 days. After an internal appeal he had his rating for productivity raised to "good". In 1993 he did 69 searches over 122.5 days, or the equivalent of 101.38 over the 180 days and after conciliation was again rated "good" for output.

6. The Organisation submits that his complaint is irreceivable because only when an examiner is given a final rating in his staff report has the target

any impact on his legal position; that until then it is just the figure to aim at; that since he had suffered no injury from the change in the target for his output the complainant's internal appeal showed no cause of action and was therefore irreceivable; and that for the same reason so too is his complaint.

7. The complainant retorts that when he appeals against the change of target the EPO tells him he is acting prematurely, whereas if he had awaited the rating to appeal it would no doubt have objected that he was out of time on the grounds that he should have appealed against the target itself.

8. The setting of the target is in itself an appealable decision: it may have an immediate adverse effect on an examiner because of the direct link between attainment of the target and the "good" rating for output in his staff report.

9. Yet only part of the relief that the complainant claims in the complaint form is the same as the relief he sought in his internal appeal, namely "C) a recalculation of the production norms for ... [his] technical field ... based on those figures which were valid till 1992".

10. On that score all that need be said is that the increased norm of 110 applied only for the year 1993: from 1994 on he was working in a different technical field. Since he was given a "good" rating for output for 1993 he has failed to show any actionable injury attributable to the change in figure. Insofar as he is objecting to the change his complaint fails because it discloses no cause of action.

11. Claim D) seeks an award of damages for his being transferred on 1 January 1994 to a new technical field, a decision he sees as a "covert disciplinary action". That claim did not form part of the internal appeal he lodged on 25 November 1993, and he put it forward for the first time in his reply of 27 September 1995 to the Organisation's brief on that appeal. By that time the claim was time-barred anyway. Claim D) therefore fails under Article VII(1) of the Tribunal's Statute because he has failed to exhaust the internal means of redress.

12. Claims A) and B) — to the establishment of new "production norms for the technical fields" and to an award of damages for "arbitrary determination of the increased production norm" and for "excessive delays" — are dismissed for the same reason: they did not form part of any internal appeal and so the complainant again has failed to exhaust his internal remedies.

13. Claim E) is to an award of damages for "the failure of the Internal Appeals Committee" and breach of due process in the appeal proceedings. It fails because the complainant's accusations are gratuitous.

14. Lastly, claim F), which is to costs, is disallowed because it is subsidiary and because the principal claims fail in their entirety.

## DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Edilbert Razafindralambo, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 30 January 1997.

Wm Douglas

WILLIAM DOUGLAS

Mella Carroll

MELLA CARROLL

E. RAZAFINDRALAMBO

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

A.B. Gardner

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Organisation internationale du Travail
*Tribunal administratif*

International Labour Organization
*Administrative Tribunal*

# EIGHTY-SECOND SESSION

## *In re* Chandrasekharan

## Judgment 1569

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Cherukat Chandrasekharan against the Food and Agriculture Organization of the United Nations (FAO) on 3 October 1995, the FAO's reply of 17 January 1996, the complainant's rejoinder of 28 February and the Organization's surrejoinder of 14 June 1996;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, an Indian born in 1933, joined the staff of the FAO in 1975 under a fixed-term appointment at grade P.4. He got a continuing appointment in 1977. In 1980 the FAO promoted him to P.5 as a senior officer for the planning of forestry. In October 1988, when he was at step 9 in grade P.5, it assigned him to a project in Indonesia at step 6 of grade D.1 and guaranteed his eventual return to headquarters in Rome at grade P.5. In November 1991 it transferred him to Bangladesh at step 8 of D.1, still with the right to return to Rome at P.5.

On 1 January 1993 he went back to headquarters. Manual paragraph 311.447 says that, when someone reverts to his old grade "after a fixed-term assignment at a higher grade", his step is to be established as if his "entire service had been at the grade ... held prior to" that assignment. The complainant was put on step 11 of grade P.5. Taking the view that he should have been put at a higher step of P.5 that would have given him a level of pay just above what he had been getting at D.1, he appealed to the

Director-General on 11 August 1994. The Assistant Director-General in charge of the Administration and Finance Department having rejected his appeal on the Director-General's behalf on 12 September, he went to the Appeals Committee on 5 October 1994.

In a report dated 2 June 1995 the Committee recommended rejection. The Director-General endorsed that recommendation in a letter of 15 September 1995, which is the decision he impugns.

B. The complainant submits that the step he got on returning to headquarters was too low. Instead of applying Manual paragraph 311.447, which is about transfer, the FAO should have applied Manual paragraphs 311.331 and 311.332, which govern change to a lower grade following a change in assignment.

He also alleges breach of equal treatment on the grounds that another official in like case got a higher step on return to headquarters than he did.

He wants the Tribunal to have his within-grade step at 1 January 1993 set in keeping with Manual paragraphs 311.331 and 311.332 and his terminal emoluments and pension benefits reckoned accordingly. He claims 100,000 United States dollars in moral damages and an "appropriate" amount in costs.

C. In its reply the FAO contends that the complaint is devoid of merit. When a staff member returns to headquarters after a fixed-term assignment in the field with "guaranteed" return rights the material rule is Manual paragraph 311.447. The rules that the complainant is relying on apply to "normal transfers or clearly specified situations" other than those of an official asserting a right to return.

In answer to the complainant's charge of discrimination the FAO explains that the official he mentions was not in the same position in fact and in law: he came back to headquarters on a new P.5 post for which he had won a competition while serving at D.1. Whereas that official was transferred to the new post at a lower grade the complainant had a right to return to the Forestry Department only at the grade he had held before going to the field.

D. In his rejoinder the complainant enlarges on his pleas and comments on the FAO's reply. In his submission the Organization fails to address the issues objectively and is vengeful.

**E. In its surrejoinder the FAO restates its case and disputes several points in the rejoinder. It argues that, having accepted the benefits under Manual paragraphs 311.442 and 311.447, the complainant is estopped from claiming the benefit that another provision afforded and that was "marginally" greater.**

## CONSIDERATIONS

1. The complainant joined the FAO in 1975. Just before his assignment to Indonesia as from 1 October 1988 he held a grade P.5 post of senior officer in the Forestry Department. On taking up duty in Indonesia he was promoted to grade D.1, but only for the duration of his assignment there. In November 1991 he was transferred under a fixed-term assignment to Bangladesh, again at D.1. He returned to duty at headquarters as from 1 January 1993 on the P.5 post of chief of the Non-wood Products and Energy Branch in the Forest Products Division of the Department.

2. The issue in this case is whether on his return to headquarters the complainant's pay should have been determined in accordance with Manual paragraphs 311.331 and 311.332 or 311.447.

3. The complainant contends that his relegation from D.1 to P.5 resulted from the change in assignment and that he was therefore entitled under Manual paragraphs 311.331 and 311.332 to the top step in grade P.5.

Those paragraphs read:

> ".331 Upon change to a lower grade level for reasons indicated in para. 311.31(i) through (iv) the calculation of the step in the new grade is based upon the salary scale operative on the effective date of the change to the lower grade level. ...
>
> .332 Where, on change to a lower grade under para. 311.331, the salary currently received by the staff member is above the amount of the top step of the grade to which he/she is being moved, his/her salary is set at the maximum of the new grade unless an exception is made by the Director-General."

4. Arrangements for the transfer of staff from headquarters to field or from field to headquarters are set out in Manual section 311.44. Paragraphs 441 to 443 of that section read:

> ".441 A staff member with a continuing appointment who is transferred to a post of limited duration retains his/her continuing appointment status.
>
> .442 Before effecting the transfer of a staff member with a continuing appointment to a post of a limited duration the releasing Department commits itself to place the staff member upon return in a similar post at the same grade level. ...
>
> .443 When the assignment of a staff member transferred under the conditions specified in paragraph 311.441 comes to an end the staff member is reassigned as specified under Manual para. 311.442. ..."

And paragraph 447 reads:

> "When, after a fixed-term assignment at a higher grade, a staff member reverts to the grade he/she had held in his/her previous post, his/her step in grade and date of eligibility for within-grade step increase are established as if his/her entire service had been at the grade he/she had held prior to the fixed-term assignment."

5. In a memorandum dated 8 July 1988 and headed "Return Rights" the Assistant Director-General in charge of the Department said to the complainant:

> "... the Forestry Department will take the responsibility for placing you at your present grade, P-5, on an available post in Headquarters, should you elect to return to Headquarters upon completion of your assignment in Indonesia."

He got a similar undertaking in a memorandum dated 31 October 1991 as to his later assignment to Bangladesh.

6. From the foregoing it is clear that it was the provisions of section 311.44 that applied to the complainant's case and that paragraph 447 was therefore the material rule. So the Organization acted correctly in applying 447 to determine his step in grade and the date of his eligibility for a within-grade step increase.

7. He has a further plea of unequal treatment. He cites the case of a staff member at grade P.4 who was assigned to a D.1 post in the field and who on return to headquarters was given step 12 in P.5, or one step higher than he.

8. He is mistaken in suggesting that his own situation and that of the other staff member were identical in fact. The other staff member had held grade P.4 but while on assignment to the field applied for and was promoted to a P.5 post. Instead of reverting to P.4 on return to headquarters he was transferred to a new post at P.5. That meant determining his step in his new grade under 331, not 447, which is limited to "return rights". The plea therefore fails.

## DECISION

For the above reasons,

The complaint is dismissed.

**In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Michel Gentot, Vice-President, and Mr. Edilbert Razafindralambo, Judge, sign below, as do I, Allan Gardner, Registrar.**

**Delivered in public in Geneva on 30 January 1997.**

Wm Douglas

**WILLIAM DOUGLAS**

Michel Gentot

**MICHEL GENTOT**

**E. RAZAFINDRALAMBO**

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

A.B. Gardner

**A.B. GARDNER**

## EIGHTY-SECOND SESSION

**_In re_ Wassef (Nos. 15 and 23)** **Judgment 1570**

THE ADMINISTRATIVE TRIBUNAL,

Considering the fifteenth complaint filed by Mr. Maher Nabih Wassef-Gerges against the Food and Agriculture Organization of the United Nations (FAO) on 8 August 1995, the FAO's reply of 28 December, the complainant's rejoinder of 8 February 1996, and the Organization's surrejoinder of 21 March 1996;

Considering his twenty-third complaint against the Organization filed on 10 November 1995 and corrected on 1 December, the FAO's reply of 15 February 1996, the complainant's rejoinder of 22 March and the Organization's surrejoinder of 12 June 1996;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the cases and the pleadings may be summed up as follows:

A. The complainant's record of employment at the FAO, which he left in January 1994, is set out under A in Judgment 1401 on his first two complaints. Facts relevant to the present complaints appear under A in Judgment 1485 on his seventh one.

On 7 January 1994 he appealed to the Director-General against "atrocities" which he said the FAO had inflicted on him while in its employ. By a letter of 9 March the Assistant Director-General in charge of the Administration and Finance Department rejected his claims on the Director-General's behalf. On 29 March 1994 he put his case to the Appeals Committee, which recommended rejection in a report of 15 April 1995.

He inferred rejection from the Director-General's failure to take a final decision and that is what he is challenging in his fifteenth complaint.

In a letter to him dated 15 September 1995 the Director-General endorsed the Committee's recommendation. That is the decision impugned in his twenty-third complaint.

B. The complainant's submissions are much the same as those he put forward in his seventh complaint. The Director-General, he says, took too long over the decision of 15 September 1995.

The reason why he has filed his twenty-third complaint is, he explains, "doubt" about the receivability of his seventh and fifteenth ones.

In his fifteenth and twenty-third complaints he asks the Tribunal to:

"1. award [me] the maximum of the compensation claimed of US $ 5 Millions for the inflicted atrocities, and

2. instruct the Administration of the FAO to raise, within two weeks from the receipt of the judgement subject to the penalty of another US Dollar Two Millions, the following separate payment authorizations ...

   2.1 Payment Voucher for 6 days' per diem for briefing in Rome, for my Libyan assignment, from 1 to 7.4.82 amounting to US $ 348.00 (April 1982 rate 58 X 6),

   2.2 Payment Voucher for 15 days' per diem for debriefing in Rome, for my Libyan assignment, from 1 to 16 July 1984 amounting to US $ 1,110.00 (August 1983 rate $ 66/day, July 1984 rate estimated by Complainant to be around $ 74/day),

   2.3 Payment Voucher for 15 days' salary for debriefing in Rome, for my Libyan assignment, during July 1984 amounting to US $ 2,000.00 (indicative lump sum re salary only),

   2.4 Payment Voucher for 3 days' per diem for briefing in Rome, for my Saudi assignment, from 17 to 20 December 1987 amounting to US $ 375.00 (December 1987 rate estimated by Complainant to be around $ 125/day),

   2.5 Payment Voucher for 13 days' per diem for debriefing in Rome, for my Saudi assignment, during February 1991 amounting to US $ 2,470.00 ($ 190/day X 13)

   2.6 Payment Voucher for 13 days' salary for debriefing in Rome, for my Saudi assignment, during February 1991 amounting to US $ 2,500.00 (indicative lump sum re salary only),

   2.7 Payment Voucher for 7 days' per diem in Paris, for accompanying wife during medical evacuation and first cure, from 2 to 9 March 1992 amounting to US $ 1,491.00 ($ 213/day X 7), 2.8 Payment Voucher for 5 days' per diem for briefing in Rome, for my Tchad assignment from 26 June to 1 July 1991, amounting to US $ 980.00 ($ 196/day X 5),

2.9 Payment Voucher with a detailed calculation for the difference due to me as a result of the recognition of my following entitlements and as a consequence;

- a) the credit of my annual leave balance with the 7 days in Paris for accompanying wife during medical evacuation and first cure in March 1992, previously deducted from my annual leave or the payment of an indicative lump sum of $ 1,500.00,
- b) the credit of my annual leave balance with the 9 compensatory days during my Saudi assignment in 1988, 1989 and 1990, or the payment of an indicative lump sum of $ 1,800.00,
- c) the credit of my entitlements with the difference due from the recognition of the period between the Saudi assignment and the Tchad assignment as leave without pay (the recalculation of my terminal emoluments based on the continuity of service which becomes more than five years), or the payment of an indicative lump sum of $ 35,000.00.

2.10 Payment Voucher for the per diem in Rome, as a continuation of the Travel Authorization raised for my Repatriation Travel combined with medical evacuation in which payment of per diem was ended on 5/10/1993, for the period from 6/10/1993 to 23/12/1994 for the reasons detailed in this Complaint, and amounting to US $ 74,831.00 details of which are;

- a) 15 days with the rate up to 60 days, from 5 to 20.10.1993 i.e. $ 219/day X 15 = $ 3285.00
- b) from 20.10.1993 until the date I am clinically cured i.e. 24.12.1993 is 65 days X $ 166/day (reduced rate after 60 days) = $ 10,790.00
- c) from 24.12.1993 to 23.12.1994, a period of 12 months as per the hospital reports for physical inability to travel and for the non assignment of part time work due to ill health; 366 days X $ 166/day = $ 60,756.00

3. declare and confirm my continuity status, my right for a continuing status and post from as early as June 1986, and
4. award me the payment of a lump sum of US $ 6,500.- for photocopies, postage, stationery, secretarial assistance, miscellaneous expenses, etc. [concerning his fifteenth complaint] and $8,500 for costs [concerning his twenty-third]."

In his third complaint he further asks the Tribunal to:

"5. award me a 25% per year of the total of above awards, salaries and entitlements as cost of money,

6. order the reimbursement by the FAO for the cost of publication of this judgement in 4 American, 4 European, 4 Asian and 4 Arab daily newspapers and magazines,

7. include in this judgement a penalty clause for its execution within 30 days from the date of this judgement equivalent to 50% of the total of awards for every two weeks of delay."

C. In reply to his fifteenth complaint the FAO argues that his claims are irreceivable for failure to exhaust his internal remedies. In any event they are devoid of merit.

In its reply to the twenty-third complaint it restates the arguments, for the plea of premature filing, in its reply to the fifteenth complaint

D. In his rejoinder on his fifteenth complaint he gives his reasons for seeking "review" of Judgment 1485. In the rejoinders on both complaints he presses his claims.

E. In its surrejoinders on his two complaints the Organization submits that he has raised no issues warranting further comment.

## CONSIDERATIONS

1. The complainant has no objection to the Organization's application for the joinder of his fifteenth and twenty-third complaints. The Tribunal therefore joins them to form the subject of a single judgment.

2. The complainant says that he filed his fifteenth complaint, on 8 August 1995, in case the Tribunal eventually ruled that his seventh one, which is identical and which he had lodged on 14 December 1994, was irreceivable. The claims he puts forward in his fifteenth complaint are set out under B above.

3. In Judgment 1485, on his seventh complaint, the Tribunal dismissed claims 1 and 2.1 to 2.10. It held claim 3, to the grant of a continuing appointment, to be premature, but it dismisses that claim too for the reasons set forth in Judgment 1571 also delivered this day, on his sixteenth complaint. Those issues are all *res judicata*.

4. In his twenty-third complaint, which he lodged on 10 November 1995, he states that his claims are the same as those he put forward in his seventh and fifteenth complaints, his explanation again being "doubt that this Tribunal may dismiss [those] two complaints for irreceivability". Those claims, being identical to the earlier ones, fail for the same reasons.

5. Since his principal claims fail, so must claims 4, 5, 6 and 7, which are subsidiary.

## DECISION

For the above reasons,

The complaints are dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 30 January 1997.

Wm Douglas

WILLIAM DOUGLAS

Mella Carroll

MELLA CARROLL

MARK FERNANDO

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

A.B. Gardner

A.B. GARDNER

Organisation internationale du Travail
*Tribunal administratif*

International Labour Organization
*Administrative Tribunal*

## EIGHTY-SECOND SESSION

***In re* Wassef (No. 16)** **Judgment 1571**

THE ADMINISTRATIVE TRIBUNAL,

Considering the sixteenth complaint filed by Mr. Maher Nabih Wassef-Gerges against the Food and Agriculture Organization of the United Nations (FAO) on 14 August 1995, the FAO's reply of 9 January 1996, the complainant's rejoinder of 13 February and the Organization's surrejoinder of 27 May 1996;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant's record of employment at the FAO, which he left in January 1994, is set out under A in Judgment 1401 on his first two complaints. Facts relevant to this complaint appear under A in Judgment 1533, in which the Tribunal dismissed his thirteenth complaint.

After seeing the complainant on 5 October 1992, the Assistant Director of the Administrative Services Division gave the complainant in a letter of 6 October what he described as "constructive comments" about the work of a civil servant, presuming, he said, that "it is in your interest to continue working for FAO".

In a letter dated 30 November 1993 the complainant asked the Director of the Administrative Services Division for transfer to a permanent post at grade P.4 at Rome in keeping with a "verbal offer" which he said the Assistant Director had made him on 5 October 1992. By a letter of 8 March 1994 the Director of the Personnel Division denied that the Assistant Director had ever made him any binding offer.

The complainant appealed to the Director-General on 11 May 1994 and by a letter of 24 June the Deputy Director-General rejected his claim. On 27 July he put the matter to the Appeals Committee, which recommended rejection in a report of 15 April 1995. By a letter of 12 June 1995, which he impugns, the Director-General endorsed the Committee's recommendation.

B. The complainant submits that the FAO failed to keep its promise to grant him a continuing appointment on a grade P.4 post at headquarters.

He asks the Tribunal to:

> "1. award [me] the maximum of the compensation claimed US $ 2,500,000 (Two Millions Five Hundred Thousand Dollars US),
> 2. award [me] the payment of a lump sum of US $ 6,000.00 for cost,
> 3. award [me] the reimbursement by the FAO for the cost of publication of this judgement in 4 American, 4 European and 4 Arab daily newspapers and magazines,
> 4. include in its judgement a penalty clause for its execution within 30 days from the date of this judgement equivalent to 50% of the total of all awards for every two weeks of delay by the FAO Administration seen the cost of money equivalent to more than 25% [I] suffered and was documented in [my] complaint No. 11 before this Tribunal."

C. In its reply the FAO says it has never made him any such promise; nor has he adduced any "valid" evidence of one.

D. In his rejoinder the complainant disputes points of fact in the reply and describes the Organization's treatment of him as malicious.

E. In its surrejoinder the FAO answers issues of fact and of law in the rejoinder.

## CONSIDERATIONS

1. The FAO employed the complainant in Chad under a fixed-term contract which was to expire at 30 September 1993. It later extended his appointment to 7 January 1994 for medical reasons in the circumstances recounted in Judgment 1531, on his ninth complaint.

2. On 27 August 1992 he sent what he called a "strictly personal" letter to the acting Assistant Director of the Administrative Services Division (AFS) in which he made remarks about other staff but no claim. That letter was passed on to the newly appointed Assistant Director of the same division, who discussed it with him on 5 October 1992 and sent him a letter the next day summing up the discussion. What is pertinent to the present claim is the concluding remark:

> "Your letter ... does not define a scope, nor does it request any particular action. I am given to understand, however, that it is in your interest to continue working

for FAO. In that spirit, I wanted to give some – hopefully – constructive comments."

3. There was nothing in that letter to suggest that the complainant had received any offer of a continuing appointment. He did not at the time in any way dispute the Assistant Director's account of the discussion. Not until nearly a year later, on 14 September 1993, did he send another official a handwritten letter which he called "personal" and in which he alleged that the Assistant Director had said to him:

> "I know that you are looking forward to put your foot back in Rome. I promise you that before the end of your present contract in Tchad, I will take the necessary actions for your transfer to a post with us here."

He followed that up in a letter of 30 November 1993 to the Director of AFS in which he claimed:

> "My transfer to a Continuing P-4 post in Rome ... in conformity with AFS confirmed proposal/offer and my acceptance ... on 5 October 1992."

4. Although the Director acknowledged that letter on 10 December 1993 with a promise to reply in due course, he did take until 8 March 1994 to answer saying that the Assistant Director had not made the alleged offer and had no authority anyway to bind the Organization that way. But the complainant's letter of 30 November 1993 had been seven pages long with 56 attachments and had set out a great litany of grievances and claims; on 11 January 1994, too, the complainant had addressed an appeal to the Director-General, putting forward this and other claims. In those circumstances the delay in replying does not weaken the force of the denial.

5. The complainant's appeal went to the Appeals Committee, and the upshot was that in a letter of 12 June 1995 and on the Committee's recommendation the Director-General rejected his claim to a continuing appointment at headquarters. That is the decision he is impugning.

6. The rules of good faith give a staff member the right to the fulfilment of a substantive promise made by the organisation that employs him provided that certain conditions are met. The Tribunal stated those conditions, for example in Judgment 782 (*in re* Geiser). One is that there must be satisfactory evidence that such promise was made. Here there is none. There is no evidence to suggest that before seeing the Assistant Director on 5 October 1992 the complainant had made any request for transfer to Rome. The Assistant Director's letter of the next day shows that at that meeting he merely took note of the complainant's interest in continuing to work for the Organization. The Tribunal is satisfied that, had the Assistant Director's summary of their discussion been inaccurate or inadequate in any respect, the complainant is not

someone who would have tarried over eleven months to put the record straight. The conclusion is that the evidence is quite insufficient to show the existence of the promise that the complainant is seeking to rely on.

## DECISION

For the above reasons,

The complaint is dismissed.

**In witness of this judgment Sir William Douglas, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.**

**Delivered in public in Geneva on 30 January 1997.**

Wm Douglas

**WILLIAM DOUGLAS**

Mella Carroll

**MELLA CARROLL**

**MARK FERNANDO**

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

A.B. Gardner

**A.B. GARDNER**

Organisation internationale du Travail
*Tribunal administratif*

International Labour Organization
*Administrative Tribunal*

## EIGHTY-SECOND SESSION

***In re* Wassef (Nos. 17 and 19)** **Judgment 1572**

THE ADMINISTRATIVE TRIBUNAL,

Considering the seventeenth complaint filed by Mr. Maher Nabih Wassef-Gerges against the Food and Agriculture Organization of the United Nations (FAO) on 23 August 1995, the FAO's reply of 12 January 1996, the complainant's rejoinder of 19 February and the Organization's surrejoinder of 29 May 1996;

Considering his nineteenth complaint against the Organization filed on 13 October 1995, the FAO's reply of 17 January 1996, the complainant's rejoinder of 26 February and the Organization's surrejoinder of 12 April 1996;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the cases and the pleadings may be summed up as follows:

A. The complainant's record of employment at the FAO, which he left in January 1994, is set out under A in Judgment 1401 on his first two complaints.

From 1 to 7 April 1982 he had briefings at the Organization's headquarters in Rome before reporting for duty on a project at Tripoli, in Libya. The travel authorisation form which the Administration drew up for him on 19 March 1982 stated that he would receive daily subsistence allowance (DSA) "upon presentation of hotel bill with [travel expense claim]". Although he did submit the travel claim he failed to provide a proper receipt from any hotel and so did not get the allowance.

On 20 May 1994 the Administration attached a copy of the travel authorisation form to a brief it submitted to the Appeals Committee. By a letter of 8 June 1994 he appealed to the Director-General against the

FAO's "Falsification of documents, Colossal Cheating, Violence and Trickery". The Deputy Director-General rejected his appeal in a letter of 25 July.

The complainant put the matter to the Appeals Committee on 24 August 1994. In its report of 15 April 1995 the Committee recommended rejection.

In his seventeenth complaint he impugns the rejection of his appeal which he infers from the Director-General's failure to give him a final decision by 23 August 1995.

In a letter of 15 September 1995 to him the Director-General notified endorsement of the Committee's recommendation. That is the decision he is challenging in his nineteenth complaint.

B. The complainant's main plea is that the travel authorisation form dated 19 March 1982 that the FAO produced was "falsified". Its "trickery", he submits, offends against "holy and sacred human values and rights".

He wants the Tribunal:

> "1. to judge and to rule on the status, the legality, the legal value and worthiness, the quality, the meaning behind, and the appropriateness of the legal evidence/document presented by the Administration as Attachment No. 1 to its Statement of 20 May 1994 ...
>
> 2. to judge and to rule on the authenticated document ... presented by the Administration with its Reply of 12 January 1995 as the Original of the legal evidence/document under (1) above,
>
> 3. to judge and to rule on the personal liability of the officers concerned behind the kind, the nature and the quality of the actions related to points (1) and (2) above and on their prejudicial manner to both the Organization and the staff,
>
> 4. to judge and to rule on the different officers' actions and measures stated in this complaint, on the legal and moral responsibility of the Senior Management in ensuring that administrative procedures are simple and clear and are not used for discriminatory purposes or in any other manner prejudicial to any parties whether it is this Tribunal and/or the Organization and/or the staff, and to order/recommend that the Director-General's actions whether taken by himself or on his behalf should be an example for the highest ethical responsible professional conduct as explicit and implicit described in the Organization's Charter which means a readiness to be continually conscious and a conduct of the highest type. It is crucial that this Tribunal, through its Judgment, confirms to the Director-General the fact that the Pride of FAO in the System's Standards is the only normative work and the self regulatory vocation,

> 5. to judge and to rule on FAO Staff Rule 303.1312 which indicates that the time limit for reply to a letter of appeal is ninety days "if the staff member has requested the Director-General to render a final decision" by highlighting that;
>
> i. if such Reply is made after the sixty days time limit established by this Court, this reply is considered final even if it stipulates the opposite and that appellant are free thereupon to come to the Tribunal, otherwise
>
> ii. a Reply to such appeal 'other than final' should be made within the time limit of sixty days,
>
> iii. FAO should clearly reflects above points (i) and (ii) in related Manual Sections,
>
> 6. to award me US $ 3 Millions (US $ Three Millions) as compensation for the injury resulting from this destructive and dishonest practice.
>
> 7. to award me the payment of a lump sum of US $ 6,000.00 for cost.
>
> 8. to order the reimbursement by the FAO for the cost of publication of this judgement in 4 American, 4 European and 4 Arab daily newspapers and magazines,
>
> 9. to include in this judgement a penalty clause for its execution within 30 days from the date of this judgement equivalent to 50% of the total of awards for every two weeks of delay by the FAO Administration."

C. The FAO replies that the seventeenth complaint is irreceivable because the complainant has failed to exhaust his internal remedies. It is, besides, devoid of merit because he did not meet the conditions for the refund of travel expenses.

Its replies to both complaints state that his claim to payment of daily subsistence allowance is time-barred. The FAO denies falsifying documents and points out that he adduces no evidence to support his allegations. Such litigation is sheer harassment.

D. In his rejoinder on his seventeenth complaint the complainant seeks to rebut the FAO's pleas on receivability. In both rejoinders he enlarges on his pleas and presses his claims.

E. In its surrejoinders the FAO maintains that the complaints are irreceivable, devoid of merit and vexatious.

## CONSIDERATIONS

1. In his seventeenth complaint Mr. Wassef is, in sum, asking the Tribunal to rule on the validity of a document dated 19 March 1982 appended to a brief dated 20 May 1994 that the Organization submitted to the Appeals Committee on one of his internal appeals, No. 449. He

accuses the Organization of falsifying that document for the purpose of countering his internal appeal. He wants the Tribunal to rule on the personal liability of the FAO officers concerned in the matter and to award him $3 million in damages and other relief.

2. His claims in his nineteenth complaint are identical, they again arise out of the document referred to above and his pleas in support are almost identical. The Tribunal therefore joins the two complaints to form the subject of a single judgment.

3. The document in question is a travel authorisation form providing for the payment of a daily subsistence allowance to the complainant in respect of a briefing at headquarters prior to his taking up duty in Libya. The document stated that the allowance was "To be made available to staff member upon presentation of hotel bill with [travel expense claim]". In the brief it submitted to the Appeals Committee on 20 May 1994 the Organization cited the travel authorisation form in support of its contention that it had by issuing the form told the complainant that to have his claim processed he would have to submit a receipted hotel bill, but he had failed to submit any.

4. The complainant pleads a contradiction between the Organization's allegation in its brief of 20 May 1994 that the travel authorization form was issued and what the Director General said in his letter of 25 July 1994 to the complainant on appeal 449, namely:

> "... the travel authorisation was prepared for approval on 19 March 1982; it was, however, not processed in view of the fact that you did not present the documents required for the payment of [daily subsistence allowance]."

The complainant's argument is wholly unfounded. Although there is provision on the form for certification, the certifying officer's signature does not appear. The fact is that for the reasons stated by the Organization the complainant received no daily subsistence allowance for the briefing prior to his assignment to Libya. Furthermore, he adduces no evidence whatever to support his accusation that the Organization fabricated evidence to rebut his internal appeal. The complaints must therefore be dismissed.

5. In Judgment 96 (*in re* Jurado) the Tribunal declared:

> "While complainants have an absolute right to apply to the Administrative Tribunal, within the jurisdiction assigned to it, without any restriction and are allowed great freedom in supporting their claims, both in form and in

> substance, this right and this freedom are granted to ensure respect for their terms of appointment."

In the present two cases the complainant's baseless, offensive and highly defamatory allegations of fraud, violence and trickery made against the Organization's officers go far beyond permissible limits and amount to abuse of process.

## DECISION

For the above reasons,

The complaints are dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 30 January 1997.

Wm Douglas

WILLIAM DOUGLAS

Mella Carroll

MELLA CARROLL

MARK FERNANDO

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
* GENEVA *

A.B. Gardner

A.B. GARDNER

## EIGHTY-SECOND SESSION

***In re* Wassef (No. 18)** **Judgment 1573**

THE ADMINISTRATIVE TRIBUNAL,

Considering the eighteenth complaint filed by Mr. Maher Nabih Wassef-Gerges against the Food and Agriculture Organization of the United Nations (FAO) on 9 October 1995, the FAO's reply of 23 January 1996, the complainant's rejoinder of 2 March and the Organization's surrejoinder of 16 April 1996;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The facts of this case are the same as those set out under A in Judgment 1534 on the complainant's fourteenth complaint. Here he is challenging the express, not the implied, rejection of his claim to an award of 2 million United States dollars in damages for the injury he says the Organization caused him by failing to provide a panel of counsel to assist appellants before the Appeals Committee. The decision he impugns is the Director-General's letter of 15 September 1995 notifying that rejection.

In Judgment 1534 the Tribunal dismissed his fourteenth complaint on the grounds that he had offered no evidence of injury.

B. The complainant's pleas on the merits are the same as those he made in his fourteenth complaint. They are summed up in Judgment 1534 under B.

He is asking the Tribunal to rule that the FAO's internal means of redress are "unlawful" and that the reports of the Appeals Committee are unreliable; to award him $2 million in damages and $6,000 in costs; to order the FAO to reimburse him the cost of publishing the present judgment in four American, four European and four Arab daily newspapers, and to include in the judgment a penalty for failure to execute the judgment within 30 days of delivery.

C. In its reply the FAO reproduces the pleas summed up in Judgment 1534 under C: the lack of a panel did not prevent the complainant from himself choosing a staff member to represent him before the Appeals Committee. In the Organization's view the complaint is vexatious and intended solely to "harass" it.

D. In his rejoinder the complainant cites case law in support of his assertion that there should be a panel of staff members to assist appellants.

E. In its surrejoinder the Organization presses its pleas and contends that the case law cited by the complainant is immaterial.

## CONSIDERATIONS

1. The complainant is claiming an amount of $2 million on the grounds of the Organization's failure to observe Appendix B to section 331 of the FAO Manual, which states in paragraph 3 that:

> "A Panel of six to ten staff members to act as Counsel is available to assist appellants before the Appeals Committee."

Such representation by counsel is, says paragraph 2, "an important element in the appeals procedure within the Organization".

2. The complainant made the same claim in his fourteenth complaint. The Organization objected at the time to the receivability of the claim on the grounds of the complainant's failure to exhaust his internal remedies. In Judgment 1534 the Tribunal rejected that plea on the grounds of inordinate delay in the internal proceedings but dismissed the complaint on the merits.

3. While that complaint was pending the Director-General took the final decision, dated 15 September 1995, that the complainant is now impugning. Since his main claim is identical to the one in his fourteenth complaint it is *res judicata* and must be dismissed. So must his other claims, which are corollaries of the main one.

## DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 30 January 1997.

Wm Douglas

WILLIAM DOUGLAS

Mella Carroll

MELLA CARROLL

MARK FERNANDO

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

A.B. Gardner

A.B. GARDNER

## EIGHTY-SECOND SESSION

***In re* Wassef (Nos. 20 and 21)** **Judgment 1574**

THE ADMINISTRATIVE TRIBUNAL,

Considering the twentieth complaint filed by Mr. Maher Nabih Wassef-Gerges against the Food and Agriculture Organization of the United Nations (FAO) on 23 October 1995, the FAO's reply of 16 February 1996, the complainant's rejoinder of 7 May and the Organization's surrejoinder of 13 August 1996;

Considering his twenty-first complaint filed against the Organization on 23 October 1995, the FAO's reply of 16 February 1996, the complainant's rejoinder of 7 May and the Organization's surrejoinder of 31 July 1996;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Considering that the two complaints should be joined to form the subject of a single judgment.

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant's record of employment at the FAO, which he left in January 1994, is summed up under A in Judgment 1401 on his first two complaints. Facts relevant to this dispute appear under A in Judgment 1486 on his eighth complaint.

By a letter of 19 June 1995 the Secretary of the Advisory Committee on Compensation Claims informed the complainant that the Committee had recommended (1) refunding all the medical expenses he had incurred for the treatment of the hepatitis B he had caught while stationed in Chad; (2) treating him as having been on sick leave with full pay for the period from 22 November 1993 to 4 January 1994; and (3) rejecting his claims to recognition of partial incapacity and payment of his wife's travel expenses from Rome to Paris and daily subsistence allowance while she was in Paris during his stay in hospital there. The Secretary told him that the Director-General endorsed those recommendations.

By letters dated 1 and 2 August 1995 he addressed appeals to the Director-General. In a single letter of 29 September 1995, which he received on 7 October, the Assistant Director-General informed him that the Director-General had rejected both appeals and that he was free to appeal to the Appeals Committee if he so wished. The complainant is impugning the implied rejection of his claims.

B. The complainant submits that the postmark on the letter of 29 September 1995 was forged. So he is, he argues, entitled to infer rejection from the FAO's failure to reply to his appeals within the time limit of sixty days set in its rules. He accuses the Administration of moral turpitude and the members of the Advisory Committee of being "unqualified charlatans".

In his twentieth complaint he asks the Tribunal to:

> "1. declare the Committee's report improper, impure and inadequate in quality,
>
> 2. consolidate the substance of this recognition by recognising my permanent partial incapacity and all related benefits from 22 August 1993,
>
> 3. extend my appointment from 4.1.1994 to the date on which this claim will be settled and approve my sick leave accordingly,
>
> 4. grant me for life effective 31.5.95 the actual date of recognition by the Director-General which was never officially communicated to me or effective the date of 27 July 1995 (date of the Secretary's communication of recognition of my service-incurred illness) an equivalent occupation at Headquarters appropriate to my qualifications, experience, title in accordance with Manual Section 342.524 ... including the promotion to P-4. Without any prejudice to any other claim of mine for the promotion with transfer to Hqs, this equivalent occupation should have been obtained at my last grade P-3 around 13 September 1993 date of my letter to dr. Eder requesting her to take necessary actions for the recognition,
>
> 5. instruct Personnel to effect the prompt payment of all benefits, entitlements, salaries according to points 3 and 4 above, plus the cost of money equivalent to 25% (twenty five per cent) per year for each amount due calculated from the day it was due,
>
> 6. instruct Personnel to effect the prompt payment of all per diem in Rome due to me from the date on which Personnel stopped it to the date on which this claim will be settled and paid plus the cost of money equivalent to 25% (twenty five per cent) per year for each amount due calculated from the day it was due (each period of 15 days to be calculated on the initial day it was due for),

7. grant me 30 days of special leave (R & R) with full pay starting the following day after the date on which this claim will be settled & prior of taking up duty,

8. award me the compensation of US $ 2,000,000.00 for not having recognised my service-incurred illness on September 1993 with all related benefits and for damages and injuries,

9. award me the compensation of US $ 2,000,000.00 for punitive damages since the Director-General disregarding my invitation in my appeal did not put an end to this treatment within the time limit established by Staff Rules for his decision on this appeal.

10. award me the payment of a lump sum of US $ 6,000.00 for cost.

11. order the reimbursement by the FAO for the cost of publication of this judgement in 4 American, 4 European and 4 Arab daily newspapers and magazines,

12. to include in this judgement a penalty clause for its execution within 30 days from the date of this judgement equivalent to 50% of the total of awards for every two weeks of delay by the FAO Administration."

In his twenty-first complaint he asks the Tribunal to:

"1. award me the compensation of US $ 1.5 Millions for this gross wilful misconduct,

2. award me the compensation of US $ 1.5 Millions for damages,

3. award me the payment of a lump sum of US $ 6,000.00 for cost,

4. order the payment of 25% per year for the total of above awards effective 2 October 1995 date of expiry of the time limit for the reply by the Director-General,

5. order the reimbursement by the FAO for the cost of publication of this judgement in 4 American, 4 European and 4 Arab daily newspapers and magazines,

6. to include in this judgement a penalty clause for its execution within 30 days from the date of this judgement equivalent to 50% of the total of awards for every two weeks of delay by the FAO Administration."

C. The FAO replies that both complaints are irreceivable because the complainant has failed to exhaust the internal means of redress. By relying on what he says is an inaccurate postmark on the envelope containing its reply of 29 September 1995 to his appeals, by treating that reply as invalid, and so by "deliberately" avoiding resort to internal remedies, he betrays the vexatious intent that underlies the two cases.

D. In his rejoinders the complainant objects to the FAO's pleas on receivability, submits that the Organization should have declared his illness service-incurred sooner and charges the Advisory Committee on Compensation Claims with "wilful misconduct".

E. In its surrejoinders the FAO maintains that the complaints are irreceivable. It points out that since the Tribunal has already found his illness to be service-incurred the matter is *res judicata* anyway. It denies that the Committee acted improperly.

## CONSIDERATIONS

1. The main facts that have given rise to these two complaints are set out in Judgments 1401 on Mr. Wassef's first and second complaints and 1486 on his eighth. In November 1993 he claimed compensation and other benefits on the grounds of service-incurred illness. The secretary of the Advisory Committee on Compensation Claims told him in a letter of 4 March 1994 that his claims were rejected. On 16 March he wrote to the secretary asking for review. Without awaiting the outcome he filed his eighth complaint with the Tribunal on 16 March 1995. The Organization objected to the receivability of that complaint on the grounds of his failure to exhaust internal remedies. In Judgment 1486, however, the Tribunal rejected that plea on the grounds of inordinate delay in the internal proceedings, went into the merits, declared the complainant's illness to have been service-incurred, and sent the case back for the Organization to determine his entitlements.

2. As the Tribunal observed in that judgment under 13, not even in its surrejoinder of 28 July 1995 had the Organization said whether the Advisory Committee's recommendations had been put to the Director-General or whether he had taken his decision. Yet it now emerges that even while that case was pending before the Tribunal the Committee had recommended, and the Director-General had agreed, that:

(a) the complainant's illness be recognised as service-incurred and that he be reimbursed all medical expenses and granted full pay for the period of his illness,

(b) his claim to recognition of partial incapacity after 4 January 1994 be rejected since he had been declared fit for work thereafter both by his own physician and by the FAO's own medical service; and

(c) his claim to payment of his wife's expenses for travel from Rome to Paris and back in connection with his illness be rejected since he had needed no additional attention while in hospital in Paris.

3. In letters of 1 and 2 August 1995 the complainant addressed appeals to the Director-General. In the one of 1 August he asked the Director-General to:

(a) declare that the Advisory Committee's report was "improper, impure and inadequate in quality";

(b) "consolidate the substance of this recognition by recognising [his] permanent partial incapacity and all related benefits from 22 August 1993",

(c) "extend [his] appointment from 4.1.1994 to the date on which this claim will be settled and approve [his] sick leave accordingly",

(d) grant him an appropriate appointment at headquarters for life,

(e) direct prompt payment of all the above benefits and entitlements with interest, and

(f) grant him 2 million United States dollars as compensation for not having recognised his illness as service-incurred in September 1993.

In his letter of 2 August he alleged that:

> "... to shoulder shamelessly Personnel's misconduct in squandering of unlawful harm to staff [the Advisory Committee] unanimously cements Personnel's ruling regarding matters which were never brought to its attention, authority nor competence.
>
> Thus, the recommendations of this Committee are designed to accommodate and to justify the wilful wrongdoings of Personnel Division. ... the present recognition of my service-incurred illness has been crookedly manipulated by the [Advisory Committee] to empty it from its real substance. Exactly, where are the benefits of my illness as service-incurred? ...
>
> In view of the foregoing and seen the nature of breach of obligations of the [Advisory Committee] and its active role for over 20 months in messing around with my case and its intentional misconduct in aiming at causing me, not only damages limited to the past 22 months but its wilful behaviour for these damages to be extendable to my future, I ... request ... the payment of [$ 3 million] as compensation for damages."

4. By his letter dated 29 September 1995 the Director-General rejected those claims. Instead of lodging an appeal against that decision with the Appeals Committee in accordance with Rule 303.1313 the complainant filed the present complaints with the Tribunal on 23 October 1995, purporting to impugn, not the express, but implied rejection of his appeals of 1 and 2 August 1995. He argues that, although the envelope containing the Director-General's letter bore a postmark dated 29 September 1995, he did not receive it until 7 October; that the decision

was not communicated to him, as Rule 303.1312 required, within the time limit of sixty days from the notification of the claims in his letters of 1 and 2 August; and that he may therefore appeal directly to the Tribunal against implied rejection. The Organization retorts that the complaints are irreceivable because the complainant has failed to go to the Appeals Committee and so to exhaust his internal remedies.

5. Rule 303.1313 provides that a staff member, if he is dissatisfied with the Director-General's reply or has received no reply within the time limit in Rule 303.1312, may submit a memorandum of appeal to the Appeals Committee. Even assuming that the complainant had not received the Director-General's decision within sixty days of the notification of the claims in his letters of 1 and 2 August, the remedy he had under Rule 303.1313 was to appeal to the Appeals Committee against the implied rejection of his claims; he was not entitled to come straight to the Tribunal. Besides, even before he acted on his assumption of implied rejection he did, on 7 October 1995, receive the Director-General's decision. He thus had an express decision and appeal against it too lay, according to the Staff Rules, to the Appeals Committee. As was held in Judgment 532 (*in re* Devisme), a complainant may no longer properly challenge an implied decision when he has an express one.

6. The conclusion is that whether he received the Director-General's letter of 29 September 1995 before or after the lapse of the sixty-day period both his complaints are irreceivable under Article VII(1) of the Tribunal's Statute on account of his failure to exhaust his internal remedies.

## DECISION

For the above reasons,

The complaints are dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 30 January 1997.

Wm Douglas

WILLIAM DOUGLAS

Mella Carroll

MELLA CARROLL

MARK FERNANDO

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

A.B. Gardner

A.B. GARDNER

## EIGHTY-SECOND SESSION

***In re* Doyle** **Judgment 1575**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Miss Deirdre Patricia Doyle against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 11 April 1996, Eurocontrol's reply of 19 July, the complainant's rejoinder of 10 September and the Agency's surrejoinder of 31 October 1996;

Considering Articles II, paragraph 5, and VII, paragraph 1, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Eurocontrol employs the complainant, who is Irish, as a senior technical assistant at grade B3 in its Experimental Centre at Brétigny-sur-Orge, in France. In a "vacancy notice/notice of competition", No. CE-94-AT/105, of 4 August 1994, Eurocontrol advertised a post for a "studies and applied research engineer". The complainant applied on 12 October 1994.

She was put on the short list and interviewed by an outside firm of consultants. But by a letter which she got on 15 June 1995 the head of the Recruitment Section told her of the Director General's decision to appoint a candidate better "suited" for the post. She lodged an internal "complaint" against that decision on 14 September 1995. Having got no reply, she infers and impugns the rejection of that complaint.

B. The complainant submits that the Director General's decision is in breach of the rules on competitions. Under Article 30 of the Staff Regulations the Agency should have held the internal competition before the external one and under Article 31 it should never have held an external competition at all because the Director General did not declare her, the only internal candidate on the short list, to be unqualified.

She claims appointment either to the disputed post as from the date at which the successful candidate took it up or to another post "of equivalent grade and function" at the Centre.

C. In its reply the Agency contends that her complaint is irreceivable on two counts: because her claims are different from those in her internal "complaint" and because the Tribunal may not order an organisation to put someone on a particular post.

In subsidiary argument on the merits Eurocontrol seeks to refute her pleas and dwells on her shortcomings in the critical area of "trajectory computation and guidance techniques".

It wants the Tribunal to order her to pay "all costs".

D. In her rejoinder the complainant maintains that her complaint is receivable and that the redress she is seeking is the corollary of her original claims. She points out that, whatever her shortcomings may be in "trajectory computation", they did not induce the selection board to declare her unfit for the post. She presses her claims.

E. In its surrejoinder Eurocontrol maintains its submissions on receivability and on the merits, "including with regard to" costs.

## CONSIDERATIONS

1. On 4 August 1994 Eurocontrol issued a "vacancy notice/notice of competition" about a post at grade A5/A6/A7 for a "studies and applied research engineer". The notice invited applications from serving staff and from "official" candidates, sponsored by national authorities, and external ones. Besides academic qualifications and knowledge of languages the notice gave as two "particular requirements":

> "Deep knowledge of trajectory computation and guidance techniques, and proven experience of their use, preferably in Air Traffic Control.
>
> Proven experience in R & D [research and development] projects."

It described the selection procedure thus:

> "An initial selection will be made on the basis of a first assessment of qualifications and experience of all candidates. Thereafter, those candidates considered suitable may be invited in a final selection procedure consisting of assessment and interviews. Further details will be given to candidates who are invited to participate."

The process of selection is governed by Articles 30 and 31 of the Staff Regulations and by Rule of Application No. 2

2. Having gone through all the applications, the selection board found seven candidates suitable, the only internal one being the complainant.

3. At an interview on 15 December 1994 she took a test of language skills, what she calls "a graphological test on a letter of motivation written during the examination", and a set of multiple-choice questions.

4. The Organisation states that eleven criteria were applied for the purpose of assessment. Each criterion was given a maximum score of 4 to 10 points according to its importance. The possible total was 72. "Trajectory computation" and "proven experience in R & D projects" were each given 10. The complainant got 2 points for the former and 4 for the latter, and a total of 46, whereas the successful candidate obtained 9, 7 and 56 respectively.

5. Eurocontrol told her by a letter that reached her on 15 June 1995 that "another candidate suited better the requirements of this particular post". On 14 September 1995 she appealed on two grounds:

> "Holding a test was contrary to Rule No. 2, because the vacancy notice had not stipulated a test, and she was never told what kind of test she would have to take and how it would be marked; and the selection process was contrary to Articles 30 and 31. The former, said the complainant, did not authorise the comparison of internal and external candidates, and required that a competition be held first for internal candidates only. According to Article 31, only if that was not fruitful could a competition be held for external candidates."

Since the letter of rejection had not said that she was unqualified for the post she asked that the competition be reopened and her candidature re-examined. Treating Eurocontrol's failure to notify its decision to her within four months as implied rejection under Article 92 of the Staff Regulations, she has filed this complaint seeking appointment to the advertised post or to an equivalent one.

*Receivability*

6. The defendant pleads that the complaint is irreceivable insofar as the relief the complainant is claiming goes beyond what she sought in the internal proceedings and because she is asking the Tribunal to issue orders to the Organisation.

7. Although the complainant has indeed asked for the first time in her complaint that she be appointed to the post, she can be only if the competition is reopened: that was indeed implicit in her internal appeal. The substance of her claim both in the internal proceedings and before the Tribunal is the reopening of the competition. To that extent her complaint is receivable; her claim to be appointed to the post or to an equivalent one is not.

*The merits*

8. The process of interview and assessment showed not only that the complainant was less well qualified than the successful candidate but also that she lacked essential qualifications for the post. So the failure to select her has caused her no actionable injury and there is no need to entertain her plea that the process of selection was flawed. Her claim to the reopening of the competition therefore fails.

9. In line with its consistent practice the Tribunal dismisses the defendant's claim to costs.

## DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 30 January 1997.

Wm Douglas

WILLIAM DOUGLAS

Mella Carroll

MELLA CARROLL

MARK FERNANDO

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

A.B. Gardner

A.B. GARDNER

# EIGHTY-SECOND SESSION

***In re* Rajah** **Judgment 1576**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Kathiravelu Canaga Rajah against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 7 November 1995 and corrected on 5 December 1995, UNESCO's reply of 26 January 1996, the complainant's rejoinder of 29 February and the Organization's surrejoinder of 3 April 1996;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a Malaysian who was born in 1934, joined the staff of UNESCO in January 1982 on transfer from the Food and Agriculture Organization of the United Nations (FAO). His first job was as a programme specialist at grade P.4 in the Reports and Documentation Division. He later served in the Bureau of Personnel and the Staff Administration Division. He retired on 30 September 1994.

By a memorandum of 23 June 1994 he applied to the Director-General for "end-of-career promotion", which administrative circular 1663 of 25 May 1989 allows in "particularly deserving" cases. Replying by a memorandum dated 18 July 1994 the acting Deputy Director-General told him that the Director-General had rejected his claim.

On 25 August he protested to the Director-General. In a letter of 3 November the Director of Personnel told him that the Director-General was upholding the decision. On 21 October he went to the Appeals Board, which in a report of 27 June 1995 recommended giving him the promotion. But by a letter of 28 August 1995, which he is impugning, the Director-General rejected his appeal.

B. The complainant submits that he met the conditions in circular 1663 for end-of-service promotion. He contends that, though circular 1883 of 6 July 1993 replaced No. 1663, the later circular did not apply to him. He pleads misuse of authority, discriminatory treatment and breach of due process.

He wants the Tribunal to quash the impugned decision and order his promotion, awards of moral damages and costs and any other "appropriate" relief.

C. UNESCO replies that refusing him promotion was a proper exercise of discretion. In any event the Tribunal will not determine whether, to quote circular 1663, someone is "particularly deserving".

D. In his rejoinder the complainant enlarges on his pleas and presses his claims.

E. The Organization observes in its surrejoinder that the rules confer no right to promotion.

## CONSIDERATIONS

1. The complainant joined UNESCO on an inter-agency transfer from the FAO in 1982 and served as a programme specialist at grade P.4. Having served in the United Nations system for over 25 years and reached the age of 59 on 30 September 1993, he made a claim on 23 June 1994 to "end-of-career promotion" in accordance with administrative circular 1663 of 25 May 1989. The circular stated that the Director-General might grant such promotion "in specific cases which he considers to be particularly deserving" for the twelve months up to the date of retirement provided that the staff member met certain conditions. The conditions were that he must have 25 years' service, have reached the age of 59, have an entirely satisfactory record of service and have had no personal promotion already in his career.

2. The Director-General did not grant the promotion and the complainant appealed. The Director-General confirmed his decision and the matter went to the Appeals Board, which recommended granting the promotion. The Director-General having rejected the Board's recommendation and dismissed the appeal on 28 August 1995, the complainant has filed this complaint with the Tribunal.

3. The complainant contends that he was entitled to claim end-of-career promotion under circular 1663, and not under circular 1883, which superseded it on 6 July 1993, because all the relevant biennial reports appraising his performance were prepared while circular 1663 was still in force. He argues that circular 1883 is discriminatory in that its retroactive application has created a class of officials who relied on circular 1663 and are left without a remedy. The Organization submits that inasmuch as his claim was made on 23 June 1994 the applicable circular is 1883.

4. Since the award of end-of-service promotion falls within the Director-General's discretion, the Tribunal exercises only a limited power of review: it will intervene only if there has been breach of some rule of form or procedure or a mistake of law or fact or failure to take some essential fact into account.

5. Circular 1883 states that it replaces the provisions on end-of-service promotions in circular 1663 with the conditions which it sets out, and which include the requirement that the staff member has had a general rating of A ("outstanding") or B ("more than satisfactory") in the last two reports on performance.

6. The complainant's argument that he may benefit under circular 1663 is unfounded because it was no longer in force by the time he made his claim. In Judgment 596 (*in re* Chomentowski) the Tribunal held that conditions of promotion do not confer an acquired right on an official but are subject to amendment. The complainant's performance was rated only C ("satisfactory") for the period ending in June 1992. So he failed to qualify for the promotion under circular 1883, the one in force by 23 June 1994. Since he has shown no flaw in the impugned decision, his complaint cannot succeed.

## DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Michel Gentot, Vice-President, and Mr. Edilbert Razafindralambo, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 30 January 1997.

W Douglas

WILLIAM DOUGLAS

MICHEL GENTOT

E. RAZAFINDRALAMBO

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

AB Gardner

A.B. GARDNER

*Registry's translation,
the French text alone
being authoritative.*

EIGHTY-SECOND SESSION

***In re* Swinnen**

**Judgment 1577**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Eric Swinnen against the European Southern Observatory (ESO) on 14 December 1995 and corrected on 21 December 1995, the ESO's reply of 10 April 1996, the complainant's rejoinder of 26 June and the Organisation's surrejoinder of 2 August 1996;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. On 1 April 1993 the ESO recruited the complainant, a Belgian born in 1944, on a three-year appointment. It assigned him to its astronomic observatory at La Silla, in Chile, where he held a post as a senior technical engineer. He served as deputy to the head of the Maintenance and Construction Department (M & C), at step 3 in grade 9. His performance proved satisfactory. In a confidential report of 29 August 1995 the head of M & C proposed giving him a three-year extension. Although — said the report — it was still unclear what post he would get since La Silla was in the throes of reform, he could take over M & C when the head left; in the meantime he had said he would accept a less senior job as leader of the Utilities Team.

The Director of La Silla is also head of the Technical and Scientific Support Department, which is known as TRS. In a memorandum of 31 August 1995 to the head of the Personnel Department he objected to extending the complainant's appointment on the grounds that M & C was to be disbanded in the course of the reforms and that to head the Utilities Team the Observatory wanted a local recruit with a background in electrical engineering.

On 4 September the complainant sent his supervisor a blueprint for reform of M & C, and it included setting up an electrical engineering group which he himself would lead. His supervisor agreed to that proposal on 7 September.

But the final schedule of reform that the Director approved on 13 September put him on the list of redundant staff.

By a letter of 7 September the head of Personnel told him on the Director General's behalf that because M & C was to go his appointment would not be renewed. He appealed to the Director General on 23 October. In a letter of 30 October 1995 the acting head of Administration told him on the Director General's behalf that according to Article VI 1.02 of the Combined Staff Rules no appeal lay against non-renewal. That is the decision he is challenging.

B. The complainant submits that the impugned decision is contrary to the ESO's interests. The real reason for it is, he says, that the Director of La Silla did not want to see him at the head of M & C and so tried to get rid of him. He contends that on recruitment the ESO promised him that job if his performance was up to scratch.

Offering him no alternative post was in breach of Article R II 6.11 of the Staff Regulations, which is about the reassignment of staff whose posts have been abolished.

He pleads two procedural flaws: the head of Personnel's decision was *ultra vires*, and he was not allowed to see the Director General.

He asks the Tribunal to set the decision aside and award him damages equivalent to three years' salary and allowances. He seeks moral damages and costs.

C. In its reply the ESO denies having promised to renew his appointment or make him head of M & C. The non-renewal was the direct outcome of the retrenchment of staff that the reforms required. The Observatory was financially better off having a local recruit in charge of the Utilities Team, since renamed the Infrastructure Support Group.

The defendant submits that the complainant may not rely on Article R II 6.11, which applies only to termination, not to expiry of appointment. It did try to place him but there were no non-local posts to match his qualifications and background.

There was no breach of due process. It is plain from the head of Personnel's letter of 7 September 1995 that it was simply conveying the Director General's decision not to renew the contract. Besides, the Director General was under no duty to give the complainant a hearing before taking the decision and already knew the complainant's views anyway from the text of his blueprint for reform.

D. The complainant rejoins that the Director General was unaware of his views. The proposals mooted on 26 August 1995 when the Director General was at La Silla put him in charge of the electrical engineering group. The final schedule put him on the list of redundant staff and ran counter to what had been decided. So the Director General could not have known the reasons for getting rid of him and the Director of La Silla decided on his own against renewal. The reason why the complainant was not put in charge of the Infrastructure Support Group was that he was overqualified and the man who got the job, a civil engineer, is not qualified for it. The ESO acted in bad faith by letting him believe until 7 September 1995 that he would get renewal.

E. In its surrejoinder the ESO submits that in the talks with the Director General on 26 August 1995 about reform not a word was uttered that might have led the complainant to expect to be heading the new Electrical Engineering Group. Indeed the head of M & C said in his report of 29 August that it was still unclear which post he might get. The complainant's own blueprint of 4 September made new suggestions and did not reflect the talks of 26 August. Though the head of M & C was in favour of renewal the Director of La Silla and the Director General were not. The leader of the new Electrical Engineering Group was chosen after reassessment of the duties of the post and of the qualifications of other members of the group. He is the man best qualified for the job.

## CONSIDERATIONS

1. The ESO employed the complainant under a three-year appointment as a senior technical engineer and deputy to the head of the Maintenance and Construction Department (M & C) at its astronomic observatory at La Silla. By a letter dated 7 September 1995, which he received on 15 September, the head of the Personnel Department gave him notice that the ESO would not be renewing his appointment after 31 March 1996, the date of expiry. Since under Article VI 1.02 of the Combined Staff Rules internal appeal does not lie against such a decision, he has come straight to the Tribunal. He seeks the quashing of the decision, payment of the equivalent of three years' salary and allowances and awards of moral damages and costs.

2. He submits that the decision of 7 September 1995 is unlawful on both procedural and substantive grounds. His procedural pleas are that the decision was taken *ultra vires* and in breach of his right to a hearing. On the merits he argues that in the absence of any criticism of his performance the non-renewal was calculated to serve the interests, not of the Observatory, but

of an overweening head of department. In any event the ESO had a duty under the Staff Regulations to look for another post for him before ending his appointment, and its failure to do so offended against Article R II 6.11 and the Tribunal's rulings about non-renewal upon abolition of post.

3. His first plea is that the head of Personnel had no authority to take the challenged decision: it is the Director General that Article R II 6.03 of the Regulations empowers to decide whether or not to extend a fixed-term appointment. The plea fails. Though signed by the head of Personnel, the letter of 7 September 1995 gave him notice "on the Director General's behalf". So this case is not on all fours with the one ruled on in Judgment 1185 (*in re* Mermier). There the Tribunal set aside as *ultra vires* a decision signed by the Leader of the Division of Personnel of the European Organization for Nuclear Research (CERN), there being no mention of delegation of authority to him by the Director-General: the Tribunal could not tell on the evidence who had taken the decision. Here the wording of the decision leaves no doubt but that the head of Personnel was merely conveying a decision of the Director General's.

4. The complainant's second plea is breach of due process in that he had not been given his say beforehand. It too is unsound. By giving him notice over six months before the expiry of his appointment the ESO met its obligations under Article R II 6.03 of the Regulations. No other rule or general principle required giving the holder of a fixed-term appointment a hearing before deciding not to extend it. In the complainant's submission he was in good faith entitled to look forward to extension, having taken part in August and early September 1995 in the talks on reform of M & C. But there is no official document before the Tribunal to suggest that he was misled over the Observatory's intentions despite his supervisor's recommending an extension, even on a more junior post.

5. Actually it is his supervisor's favourable opinion of him that has prompted his plea that the reasons for the decision had nothing to do with his record of service or the Observatory's interests. True, the head of the department of which he was deputy head and the Director at La Silla were at odds about how the reforms of the technical units would affect him. In a report of 29 August 1995 the former recommended extension, though the post he was to have eventually was still unclear. But the Director made it quite plain in his memorandum of 31 August 1995 that since M & C had to go so must the posts of head and deputy head and the complainant's appointment therefore could not be extended.

6. Setting up a very large telescope (VLT) some five hundred miles away meant less work and fewer staff for the site at La Silla. Among other things, it meant the end of M & C. There is no evidence to suggest that the reform was contrary to the ESO's interests; in fact it served them. The Director of La Silla did obviously have a hand in the decisions to take the complainant off a post that was doomed anyway and to put a locally recruited civil engineer in charge of the Infrastructure Support Group, a job that the complainant would have taken. Yet there is no evidence of misuse of authority.

7. The complainant's last plea turns on the ESO's failure to offer him another post after abolishing the one he held. That, he argues, offended against Article R II 6.11 of the Staff Regulations. But what the provision says is that the Director General may not terminate an appointment before trying to find the staff member some other post: it has no bearing on a decision not to extend a fixed-term appointment beyond the scheduled date of expiry. At all events the Observatory maintains, and the complainant fails to disprove, that it had no suitable vacancy for a non-local official with his qualifications and experience.

8. Since bad faith may not be imputed to the defendant, the complainant's claim to the quashing of the impugned decision cannot succeed. His claims to damages and costs must therefore fail as well.

## DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Michel Gentot, Vice-President, and Mr. Edilbert Razafindralambo, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 30 January 1997.

*(Signed)*

WILLIAM DOUGLAS MICHEL GENTOT E. RAZAFINDRALAMBO

A.B. GARDNER

## EIGHTY-SECOND SESSION

***In re*** **Freeman (No. 4)** **Judgment 1578**

THE ADMINISTRATIVE TRIBUNAL,

Considering the fourth complaint filed by Mr. Edward James Freeman against the Food and Agriculture Organization of the United Nations (FAO) on 28 December 1995 and corrected on 31 January 1996, the FAO's reply of 24 May, the complainant's rejoinder of 16 July and the Organization's surrejoinder of 14 October 1996;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a citizen of the United States born in 1932, served on the staff of the FAO from 1969 until 31 December 1994, when he retired at grade P.5. In November 1993 the Conference of the Organization empowered the Director-General to review its programmes, structures and policies "with all necessary speed". The Director-General having mooted reform with staff representatives, the Council of the FAO approved in June 1994 a plan to change the Organization's structure and in particular to shift some of the work done at headquarters to field offices.

The last stage of the plan, known as phase IV, entailed the review of posts and the redeployment of some staff. At a meeting of the Programme and Policy Advisory Board on 22 June 1994 the Director-General promised to consult staff representatives on the "modalities" of that phase once the first three were over, namely revising the "organizational chart" (phase I), matching skills with post descriptions (phase II) and reviewing the functions of the Organization's "components" (phase III).

In a memorandum of 26 July 1994 the complainant informed the Assistant Director-General in charge of the Administration and Finance Department that the staff thought it high time "true consultation" began. By a letter of

12 August the Assistant Director-General replied that the Director-General would indeed be consulting the staff once phase IV was under way. On 21 September 1994 the complainant appealed to the Director-General under Staff Rule 303.1311 against what he saw as the refusal to "consult and negotiate" conveyed in the Assistant Director-General's letter of 12 August. In a letter of 21 October 1994 the Assistant Director-General rejected his appeal on the Director-General's behalf. He went to the Appeals Committee on 24 October. In a report dated 9 June 1995 the Committee held his appeal to have been "founded at the time of its submission" and recommended "more regular" contact between Administration and staff. But by a letter of 6 October 1995, which he is impugning, the Director-General rejected his appeal.

B. The complainant submits that the Organization infringed his freedom of association. Its acknowledged refusal to consult staff representatives and to negotiate in the first three phases was in breach of the Staff Regulations and Rules and of the recognition agreement it had concluded with the staff association he belonged to. It was not free to decide on its own about conditions of employment and matters of staff welfare. It gave the Council "inaccurate and misleading" information and acted unilaterally in suspending its policy of converting fixed-term contracts to continuing ones.

The complainant wants the Tribunal to quash the impugned decision and order the FAO to "consult and negotiate with the staff representative bodies" in keeping with the rules or else pay him 200,000 United States dollars in damages. He also claims $15,000 in costs and any other redress the Tribunal thinks fit.

C. In its reply the FAO contends that the complaint is devoid of merit. It denies breach of the rules, of the recognition agreement and of any moral duty it owes its staff. It neither suspended nor thought of suspending the conversion of appointments. Since the restructuring has led to the transfer of no more than 45 staff, things are far less "dramatic" than the complainant makes out.

D. In his rejoinder the complainant presses his claims and insists that the proper time to sound out staff representatives is while policy is still moot. In any event the Organization made "true dialogue" with his association impossible.

E. In its surrejoinder the FAO rebuts arguments in the rejoinder, maintaining that in any event consultation need not stretch to negotiation.

## CONSIDERATIONS

1. The complainant joined the Organization in 1969 and before retiring at the end of 1994 was chief of the Management Support Unit in the Department of General Affairs and Information. He was also general secretary of the Association of Professional Staff (APS) of the FAO and the World Food Programme. He has brought this case in his own name on the grounds that the Organization committed a breach of his freedom of association as a staff member.

2. At its 27th Session (November 1993) the FAO Conference adopted a resolution, No. 10/93, asking the Director-General to "undertake with all necessary speed a review of the programmes, structures and policies of the Organization". The resolution suggested giving the Director-General's successor-to-be the opportunity of reviewing the Organization's programme of work and, in consultation with member countries, making his own proposals on structures and policies so far as funds allowed.

3. The new Director-General took office on 1 January 1994. On 18 February he put a new "organizational chart" to the Programme and Policy Advisory Board. There were to be, among other things, a new unit for "co-ordination" and a department for "sustainable development" bringing together "research, extension and education" services which had till then been in separate departments. That was the first phase of the restructuring, the aim being to work out "the optimum organizational chart for carrying out the main functions" of the FAO. The second phase consisted of "defining the best combination of talents/post descriptions for carrying out in the most effective way the functions of each new component of the organizational chart". The third phase was a study to be done by heads of department and directors of division of "the functional relationship between the various components of the Organization". The fourth phase would consist of "filling the posts so that each unit, both at [headquarters] and in the decentralized structure, has the optimum staffing".

4. A comprehensive review by the Director-General of programmes, structures and policies went to the Council at its 106th Session (30 May to 1 June 1994). The review spoke of "the reduced margin of manoeuvre inherent in a no-growth budget coupled with restraints of staff in place" who had already had their contracts renewed. It proposed the decentralisation of technical work to regional, sub-regional and country levels.

5. The Director-General saw staff representatives in April, before the Council had met, and again in June and August 1994. The Organization also

invited staff representatives to attend as observers meetings that the Programme and Policy Advisory Board held in February and in June 1994.

6. In February 1994 the Organization had sent the APS the draft of an administrative circular on interim changes. It dealt with the suspension of recruitment and the policy of not extending contracts beyond 31 July 1994. The Association protested about that policy. It protested further in July 1994 on seeing another draft circular on the assignment of staff after the review of programmes: it took the view that it should have been consulted beforehand.

7. On 19 September 1994 the Director-General issued a text headed "Guidelines on consultations with staff representative bodies on restructuring". The objectives were (1) to make the process "transparent"; (2) to follow established regulations and procedures; (3) to ensure "objectivity" in "meeting the paramount interests" of the Organization; and (4) to provide an "equitable mechanism" for dealing with cases in which staff felt that their "concerns" had not been "adequately taken into account". "The accomplishment of these objectives would", said the text, "help boost staff morale". It went on to declare that the "determination and establishment of posts" were "a matter of management"; and so was the "transfer of incumbents on posts shifted from one unit to another at headquarters". As to the redeployment required by structural reform, "regular contacts and briefings with the staff representatives" would be "organized on general or individual cases".

8. On 21 September 1994 the complainant appealed against what he saw as the Director-General's refusal to consult and negotiate with the recognised staff bodies during the process of restructuring about the terms of employment and general welfare of staff. A letter of 21 October 1994 from the Assistant Director-General in charge of the Administration and Finance Department rejected his appeal on the Director-General's behalf and on 24 October 1994 he went to the Appeals Committee. In its report of 9 June 1995 the Committee held that phases I and III did not affect the terms of employment of individual staff but did have broader implications; management should have kept in closer touch with the staff in those phases; and phase IV required consultation with the representative bodies. The Committee recommended more regular consultation. In his decision dated 6 October 1995 — the one impugned — the Director-General declared that phases I to III, being restricted to matters of management, had not affected terms of employment and that the Organization had provided the staff with full relevant information anyway. Being of the view that the Organization had acted properly, he dismissed the appeal. The complainant filed his complaint on 28 December 1995.

9. Staff Regulation 301.081 provides:

> "In accordance with the principle that the staff has the right to organize for the purpose of safeguarding and promoting its interests, one or more representative staff bodies recognized by the Director-General shall maintain continuous contact and negotiate with the Director-General with respect to the terms and conditions of employment of the staff and general staff welfare."

Regulation 301.0811 reads:

> "Negotiations between recognized staff representative bodies and the Director-General shall be subject to the understanding that the Director-General will retain under the provisions governing his constitutional responsibility, the right of final determination in matters within his authority."

Staff Rule 302.82 states:

> "Consultation and negotiation between the Director-General and recognized staff representative bodies shall be carried out in accordance with Staff Regulations 301.081 to 301.0813 and the recognition agreements in force with the body or bodies concerned."

10. The Director-General and the APS concluded a recognition agreement on 28 July 1976. Clause 2.2 provides:

> "The Organization confirms the right of the Association to consult, be consulted and, where appropriate, negotiate on terms and conditions of employment and on any other matter which it is agreed directly affects the general welfare of the membership of the Association. ..."

and clause 3.1:

> "The Association acknowledges that the granting of recognition in no way detracts from the Director-General's 'power and authority to direct the work of the Organization' (Article VII 4 of the Constitution)."

11. The complainant contends that, whatever contacts the Organization may have had with the APS over the restructuring, they may not be considered to have met the requirements of consultation and negotiation laid down in the legal provisions. He argues that the Director-General's decisions on restructuring, even if within the ambit of his constitutional authority, did not follow proper consultation or negotiation with the bodies representing the staff.

12. The FAO replies that a fundamental balance must be struck between the powers of its governing bodies to set policy, the Director-General's authority to carry it out and direct the Organization's work, and the staff's right to be consulted on matters that affect their welfare. The Organization submits that policy is a matter for the Administration alone and that only at the later stages of implementation, when the careers and welfare of individual staff

members may be directly affected, are consultation and, where appropriate, negotiation required.

13. In Judgment 380 (*in re* Bénard and Coffino) the Tribunal held that although consultation and negotiation might often overlap there was a clear distinction between them. Where the outcome of discussion was a unilateral decision, the right term was "consultation"; when it was bilateral agreement then the term was "negotiation".

14. The complainant's principal plea is that all four phases of the restructuring exercise fell within the scope of the Organization's legal obligation to consult and negotiate. Yet the first three raised no issue concerning actual terms of employment or staff welfare but were about structures at headquarters and decentralisation to regional and sub-regional offices. The rights that Regulation 301.081 confers on staff are to continuous contact and negotiation on their terms of service and general welfare. The plea therefore fails insofar as it relates to phases I to III of the exercise.

15. As for phase IV, events have overtaken the complainant's plea. There have been consultations on the reassignment of staff to regional and sub-regional offices. A task force was set up for the redeployment of headquarters and field staff, and it consisted of three representatives of the Administration, three from the APS and two from the Field Staff Association. Its terms of reference included the reassignment of staff on abolished posts or on posts of altered content which the incumbent's background and experience no longer fitted. Those terms of reference were amended at the APS's insistence. The task force held 35 meetings in all from March to December 1995. The upshot was that 45 staff were reassigned. In only one case was there appeal against a proposed transfer, and it was amicably settled. In the circumstances the complaint is premature insofar as it relates to phase IV.

16. The complainant's pleas not being supported by the evidence, his complaint must fail.

## DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Michel Gentot, Vice-President, and Miss Mella Carroll, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 30 January 1997.

Wm Douglas

WILLIAM DOUGLAS

MICHEL GENTOT

Mella Carroll

MELLA CARROLL

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

A.B. Gardner

A.B. GARDNER

# EIGHTY-SECOND SESSION

## *In re* McLean (No. 3) **Judgment 1579**

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Mr. Gregor Adrian McLean against the European Patent Organisation (EPO) on 11 July 1996;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Article 7, paragraph 2, of its Rules;

Having examined the written submissions;

### CONSIDERATIONS

1. The complainant is seeking an order that the EPO award him six days' leave in compensation for the time of travel to the place where he takes home leave, which is Sydney, in Australia, and back to Munich, his duty station. He explains that his complaint is based on the principle of equal treatment and not upon EPO circular 22, which sets guidelines for the taking of leave under Article 59 of the Service Regulations.

2. In Judgment 1493, which dismissed his second complaint, the Tribunal ruled on his claim to six days' extra leave, which he based on the plea that the rights provided for in the two tables in Rule 4(e) of circular 22 were cumulative. Judgment 1493 rejected that claim, the matter is *res judicata*, and the Tribunal's ruling is binding on the complainant. Besides, the fact that the Organisation is applying to him the same rules about travel on home leave that it is applying to staff members whose home is nearer to their duty station constitutes no breach of equal treatment. Being clearly irreceivable, the complaint must be summarily dismissed in accordance with Article 7(2) of the Tribunal's Rules.

### DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Michel Gentot, Vice-President, and Mr. Edilbert Razafindralambo, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 30 January 1997.

Wm Douglas

WILLIAM DOUGLAS

MICHEL GENTOT

E. RAZAFINDRALAMBO

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

A.B. Gardner

A.B. GARDNER

## EIGHTY-SECOND SESSION

**_In re_ Gupta (No. 3)**
**(Application for review)**

**Judgment 1580**

THE ADMINISTRATIVE TRIBUNAL,

Considering the application for review of Judgment 1473 filed by Mr. Shiv Raj Gupta on 16 July 1996;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Article 7, paragraph 2, of its Rules;

Having examined the written submissions;

### CONSIDERATIONS

1. The complainant is an employee of the World Health Organization (WHO). In this, his third complaint, he is applying for the review of Judgment 1473. That judgment declared his first complaint against the WHO to be irreceivable. The grounds were that he had failed to bring an internal appeal in time against the Organization's decision of 27 April 1987 refusing payment of a special education grant for his daughter. What he did do was to apply on 14 July 1987 for review of that decision. He had argued that the matter had remained open until exactly six years later, 14 July 1993, when the Director of Personnel wrote a memorandum confirming that his daughter failed to qualify for the grant. The material issue was whether the decision of 27 April 1987 was a final one. The Tribunal held that it was as to refusal of the grant and that, even though the Organization was willing to change its mind if the evidence so warranted, its decision was still a final one. In the event the complainant failed to produce admissible evidence and the Organization took no new decision.

2. He is now asking the Tribunal to reconsider whether the decision of 27 April 1987 was final. He alleges that "by entertaining subsequent correspondence" the Organization "kept him in a state of suspense and misguided him with the sole objective of putting him in a trap". He cites

a passage in Judgment 1376 (*in re* Mussnig) which says that the rules on internal appeals "are not supposed to be a trap or a means of catching out a staff member who acts in good faith".

3. Judgment 1473 went into detailed consideration of the material issue, whether the decision of 27 April 1987 was final, and held that it was. In Judgment 442 (*in re* de Villegas No. 4) and in many later ones the Tribunal has declared that an alleged mistake of law or misappraisal of the facts does not afford admissible grounds for review. What the applicant is alleging is indeed misappraisal of the facts and failure to follow precedent, i.e. a mistake of law. Those are not grounds on which his application can succeed. It must therefore be summarily dismissed as clearly irreceivable under Article 7(2) of the Tribunal's Rules.

## DECISION

For the above reasons,

The application is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 30 January 1997.

Wm Douglas

WILLIAM DOUGLAS

Mella Carroll

MELLA CARROLL

MARK FERNANDO

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

A.B. Gardner

A.B. GARDNER

## EIGHTY-SECOND SESSION

***In re* Rombach-Le Guludec** **Judgment 1581**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs. Valérie Jeanne Cécile Rombach-Le Guludec on 28 October 1996 against the European Patent Organisation (EPO);

Considering Article II, paragraph 5, of the Statute of the Tribunal and Article 7, paragraph 2, of its Rules;

Having examined the written submissions;

### CONSIDERATIONS

1. The complainant is a staff member of the European Patent Office, the secretariat of the EPO, at The Hague. On 4 December 1995 she took part in a demonstration at the Organisation's headquarters in Munich to protest against meetings of the heads of delegation of its Administrative Council. She alleges that during the demonstration she was assaulted by the then President of the Office and sustained injury and consequential pain and distress.

2. On 11 March 1996 the complainant learned from a communiqué from the new President to the staff that in response to a letter from the German authorities the Administrative Council had decided not to waive the immunity of the former President in regard to that incident.

3. By a letter dated 7 June 1996 to the chairman of the Administrative Council the complainant lodged an internal appeal against the decision not to waive the former President's immunity.

4. By a letter dated 29 July 1996 the chairman informed her that she was not free to appeal against decisions of the Council. He added, however, that she was obviously quite aware that the Service Regulations provided other means of redress and so did not leave her without legal protection. That is the decision which she is impugning.

5. She is asking the Tribunal -

(a) to rescind the Administrative Council's decision not to waive the former President's immunity and "to regard it as not having been taken";

(b) to order the Council to waive the former President's immunity;

(c) to order the EPO to inform the German authorities that the former President's immunity is waived;

(d) to award her 20,000 guilders in damages for "the moral prejudice suffered as a result of the fact that the immunity was not immediately waived";

(e) subsidiarily, to order the Council to convene an Appeals Committee as provided for in Article 110 of the Service Regulations "without delay to deliver an opinion on the present matter"; and in any event

(f) to award costs.

6. In Judgment 1543 (*in re* Popineau No. 12) the Tribunal declared that the decision whether or not to waive the President's immunity fell within the Council's discretion and that "such exercise of discretion is a matter outside the Tribunal's competence, affecting as it does relations between the defendant Organisation and a member State".

7. The reasoning in 1543 holds good for the instant case. Since the complaint is therefore clearly irreceivable it must be summarily dismissed in accordance with Article 7(2) of the Tribunal's Rules.

## DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Michel Gentot, Vice-President, and Mr. Edilbert Razafindralambo, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 30 January 1997.

Wm Douglas

WILLIAM DOUGLAS

MICHEL GENTOT

E. RAZAFINDRALAMBO

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

AB Gardner

A.B. GARDNER

***Registry's translation,***
***the French text alone***
***being authoritative.***

# EIGHTY-SECOND SESSION

***In re* Seissau (No. 2)** **Judgment 1582**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mrs. Maryse Seissau against the European Organization for Nuclear Research (CERN) on 2 February 1996 and corrected on 11 March, CERN's reply of 31 May, the complainant's rejoinder of 23 August and the Organization's surrejoinder of 18 October 1996;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Facts material to this dispute are set out under A in Judgment 1416 on Mrs. Seissau's first complaint. In that case she challenged a decision of 3 March 1993 by the Director-General to put her on career path III. The Tribunal found no evidence to bear out the Director-General's contention that her duties differed "in level of performance" from those of a former colleague of hers who had been put on path IV. Being unable to review the reasons for his decision or tell whether it offended against equity, the Tribunal set the decision aside and sent her case back for the Organization to take a new decision on her career path "in keeping with the material rules".

In execution of that judgment the Director of Administration sent her a letter dated 21 July 1995 confirming her assignment to path III on the grounds that it matched her duties at the date of the decision she had been objecting to; her colleague had got path IV on account, not of her duties at the time, but of those she was likely to be given on the strength of good performance, in other words, of her "potential".

By a letter of 13 September 1995 the complainant appealed to the Director-General and applied for leave to go straight to the Tribunal in the event of rejection.

By a letter of 9 November 1995, the impugned decision, the Director of Administration rejected her appeal on the Director-General's behalf and granted her the leave she wanted.

B. The complainant submits that CERN is making out that she no longer objects to being on path III and has drawn plainly wrong conclusions from the evidence.

She observes that the "Instructions for the designation of career paths to present staff members", issued on 3 October 1991, say that such "designation":

> "has to be fair to all staff, as objective as possible, and to normally place staff in a career path where they have reasonable prospects for future ... advancement."

She pleads unfair treatment in that she and the other staff member were in like case when set on different paths. To her mind CERN fails to prove that it had any intention at the material time of changing her colleague's duties or told the Joint Advisory Appeals Board as much in explicit terms. Not until mid-1993 did her colleague actually get new duties.

She accuses CERN of bad faith in trying to explain away her career path by arguments it never offered in the pleadings on her first complaint.

She wants the Tribunal to quash the impugned decision and have her career path changed from III to IV as from 1 March 1992. She claims moral damages and costs.

C. In its reply CERN says that the assessment of the level of her duties is *res judicata* because Judgment 1416 found no obvious flaws in that assessment. So the only material issue is whether the manner of executing that judgment was fair.

CERN says that it abided by the rule of equal treatment: the reason why the other staff member got path IV was indeed that it had decided to give her new and higher duties. That is plain from a memorandum of 4 November 1991 in which the other staff member's supervisor said that she could take on more responsibility in the context of reforms of her unit, Financial and Accounting Services. The head of Classification and Remuneration Services so informed the chairman of the Appeals Board in a memorandum of 16 November 1992. The reason why the other staff member did not take on the new duties until mid-1993 was delay in the reforms for technical reasons which could not be foreseen at the time the career path was chosen. Though the complainant may think it unfair that CERN kept the other staff member on path IV notwithstanding, the delay makes no difference: a firm line of precedent has it that "a staff member may not rely upon an unlawful act or a benefit granted *ex gratia* to other staff in support of his own claim" see, for example, Judgment 1321 (*in re* Bernard).

The defendant submits that it was merely acting on Judgment 1416 in explaining its reasons for putting the complainant's former colleague on a higher path and so may not be accused of bad faith. The complainant was already aware of the facts underlying that explanation: the Director-General told her in his letter of 3 March 1993 that he was rejecting her appeal because he did not consider her duties to be on a par with her colleague's in "level of performance", and he was thereby acknowledging her colleague's potential.

D. In her rejoinder the complainant points out that she has never challenged the lawfulness of the decision to set the other staff member on path IV. What she is saying is that it was unfair to put her on path III although at the time both of them were in the same position. In its reply to her first complaint the defendant argued that the Director-General had reviewed the level of her duties as against her colleague's at the time. What is more, in the hearings before the Appeals Board CERN spoke, not of her colleague's "potential", but merely of "other" reasons for choosing path IV.

E. In its surrejoinder CERN maintains that the complainant's duties fit path III. She and her former colleague not being in like case, there has been no breach of equal treatment. The fuller explanation the Organization gave in the letter of 21 July 1995 corrected the oversight identified in Judgment 1416 and enlarged on the letter of 3 March 1993.

## CONSIDERATIONS

1. The salient facts of this case are set out in Judgment 1416, which the Tribunal delivered on 1 February 1995 on the complainant's first complaint. That judgment set aside a decision that the Director-General had taken on 3 March 1993 to put the complainant on career path III and sent the case back for a new decision by CERN on the "designation" of her career path. It dismissed most of her pleas. It rejected the one about her

age, under 5. In 6 it rejected her contention that there had been obvious misappraisal of her duties, even though it held that path IV would not have been out of the question; and it also disallowed her plea that path III had denied her reasonable prospects of advancement and disregarded her interests and the need to encourage her. The Tribunal was unable, however, to make a final ruling on her contention that putting someone with like duties on path IV had been in breach of equal and equitable treatment. The Joint Advisory Appeals Board had declared their duties and responsibilities to be comparable. Though the Director-General thought the comparison too narrow, neither the text of the impugned decision nor the evidence suggested where any difference might lie. So in 7 the judgment set the challenged decision aside for want of an adequate explanation and sent the case back for CERN to take a new decision "in keeping with the material rules". Since she had shown no material injury and since the quashing of the decision gave her "sufficient redress" for the moral injury she had alleged, the judgment said in 8 that no awards were due on those counts.

2. By a decision of 21 July 1995 the Director of Administration kept her on path III. He explained that, although she and the other staff member had similar duties and responsibilities, the reason why the other had been put on path IV went back to the date of the original decision. It was –

> "the duties that the Financial Division had decided on the strength of past performance to give her in the context of the reforms scheduled for the first half of 1992. So CERN set her on path IV because of her potential. For wholly technical reasons the reforms were unfortunately held up, and so was her assumption of new duties, until mid-1993."

That is why the complainant thought she had been discriminated against.

Having sought to no avail to have the decision changed, she was granted leave to come straight to the Tribunal.

3. She has three pleas.

(a) The conclusions that the impugned decision drew from the evidence were obviously wrong in assuming that she was no longer challenging the decision to put her on path III.

(b) There was breach of the rules on fair treatment. She suspects that to hide its breach of equal treatment CERN made up *ex post facto* the argument about the other staff member's new duties.

(c) CERN was in bad faith. At the outset it said nothing, at least to the complainant, of the reason it is now offering. Good faith precludes its bringing up a new issue to her detriment.

CERN pleads *res judicata*. The complainant is, it says, mistaken: it intended all along to put the other official on path IV on account of her potential, and that is provided for in the "Instructions for the designation of career paths to present staff members" of 3 October 1991. She was soon to take on new duties and responsibilities in the reformed unit. Though told as much, the Appeals Board overlooked the issue in recommending that both officials be on path IV. CERN's reason for failing to tell the complainant at the time why it was treating them differently was that it did not want to disclose privileged information about someone else's career.

4. The Tribunal's judgments — including, of course, remand for a new decision — are binding on both parties and indeed on the Tribunal itself.

So the complainant may not properly object to being put on path III on any grounds other than unfair treatment. Her claim to moral damages is equally misconceived. Some of her pleas are really challenges to CERN's original decision, not to the one impugned in this complaint. So she is wrong to take CERN to task for misleading her and the Tribunal in failing to disclose the real reason for treating the other staff member differently. It was because of CERN's failure to give an explanation that the Tribunal ruled as it did in the earlier judgment, rejecting her claims to material and moral damages and granting her costs. The same failure affords no grounds for allowing her second complaint as well. All that need now be determined is whether in taking the impugned decision the Director-General acted as ordered and whether his explanation squares with equal and equitable treatment as between the two staff members.

5. The Tribunal is satisfied that at the time of the original decision the Organization intended soon to give more demanding duties and responsibilities to the other staff member than to the complainant and for that reason treated their cases differently. So there is no need to determine whether it might have based its later decision on new circumstances that it had never had in mind when taking its original decision.

What led their supervisor in his memorandum of 6 November 1992 to propose putting the complainant's colleague on path IV was the intention of giving her new duties. The head of Classification and Remuneration Services so informed the Appeals Board in a memorandum dated

16 November 1992, though the complainant got no word of that at the time.

6. The "Instructions for the designation of career paths to present staff members" say:

> "The criteria used will be the staff member's present classification and level of function together with his/her potential."

The complainant challenges neither the criterion of "potential" nor the way in which it was applied to her colleague's benefit. Since the two officials were not in the same position, there cannot have been any breach of equal treatment.

7. The nub of the complainant's case is that, as presented at the time of the original decision, the facts suggested that they were in like case, and that led her to claim path IV by virtue of her right to equal treatment. That is why, to her mind, CERN acted in bad faith and therefore had a duty to put her on the higher path.

But her pleas betray misunderstanding of Judgment 1416 and the *res judicata* rule. What is plain is that CERN was not bound by its inadequate attempt to explain how its original decision had respected equal and equitable treatment. It had to take a new decision, a difference in treatment being warranted only if the two officials were not in like case. So it was free to come to the same conclusion about the complainant's career path provided it could show that they were not.

Judgment 1416 awarded redress for CERN's failure to account for its first decision and in particular did not allow her claim to path IV.

Her second complaint is utterly devoid of merit.

## DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment Mr. Michel Gentot, Vice-President, Mr. Edilbert Razafindralambo, Judge, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 30 January 1997.

*(Signed)*

MICHEL GENTOT E. RAZAFINDRALAMBO EGLI

A.B. GARDNER

Organisation Internationale du Travail
*Tribunal administratif*

International Labour Organisation
*Administrative Tribunal*

*Registry's translation,*
*the French text alone*
*being authoritative.*

# EIGHTY-SECOND SESSION

***In re* Ricart Nouel**

**Judgment 1583**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Rafael Ricart Nouel against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 13 November 1995, UNESCO's reply of 14 December 1995, the complainant's rejoinder of 13 February 1996 and the Organization's surrejoinder of 15 March 1996;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a citizen of the Dominican Republic who was born in 1941, joined UNESCO in September 1976, on a fixed-term appointment. He served in Guatemala as a regional liaison officer at grade P.3 for the preservation of the cultural heritage. At the material time he was stationed at the Regional Office for Culture in Latin America and the Caribbean (ORCALC), in Havana.

In a report of 21 October 1991 on his performance from March 1990 to August 1991 his first-level supervisor, the Director of ORCALC, gave him an E rating (unsatisfactory). On 28 February 1992 the Deputy Director-General for Management, who chaired the Reports Board, rejected the report on the grounds of a procedural flaw and ordered another one.

In a second report of 17 July 1992 the Director of ORCALC gave the complainant the same general rating, and he challenged it in a memorandum of 11 September. The Reports Board met on 29 October. It recommended making no change in the E rating. By a memorandum of 12 November the secretary of the Board told the complainant that the Director-General had endorsed the recommendation. On 23 December 1992 he addressed a "complaint" to the Director-General against the decision. By a memorandum of 20 January 1993 the Director of the Bureau of Personnel rejected it on the Director-General's behalf. The complainant lodged an appeal on 18 February 1993.

The Senior Personnel Advisory Board (SPAB) had been consulted on 14 December 1992 about the renewal of the complainant's appointment. Its opinion was that a written warning or postponement of annual increment would be more fitting than separation. The Director of Personnel nonetheless notified to the complainant in a telex of 29 January 1993 a decision by the Deputy Director-General for Management not to renew his appointment after 31 January and to let him have the equivalent of three months' pay in lieu of notice. By a letter of 5 February the complainant asked the Director-General to reconsider. In a memorandum of 8 March the Director of Personnel refused on the Director-General's behalf. The complainant lodged an appeal on 26 March 1993.

On 27 June 1995 the Appeals Board reported on both appeals. It recommended having some other suitable official write a new report for 1990-91 and reinstating the complainant as from 1 February 1993. By a letter of 21 September 1995 — the impugned decision — the Director-General upheld the decisions the complainant had challenged.

B. The complainant alleges breach of due process in setting aside his first performance report. He cites several incidents which in his submission showed the bias of his first-level supervisor in the second appraisal of his performance.

The decision not to renew his appointment is, to his mind, unlawful because it is unexplained and draws mistaken conclusions from the evidence.

He seeks the quashing of the impugned decision, reinstatement as from 1 February 1993, the renewal of his appointment, an award of moral damages in an amount he puts at 2,000 United States dollars, and 12,000 French francs in costs.

C. UNESCO replies that he is too late to challenge the decision, notified on 28 February 1992, to set aside his first report. The new report was uninfluenced by the previous one and shows neither procedural flaws nor bias.

He had known since being summoned by the SPAB that the grounds for non-renewal were unsatisfactory performance. Staff Rule 104.6(b) says that renewal of a fixed-term contract is at the discretion of the Director-General, on whom the SPAB's recommendation is not binding. The impugned decision was taken on the strength not only of the last appraisal of his work but of his previous performance, which had not been "entirely satisfactory".

D. In his rejoinder the complainant enlarges on his pleas. He says he had no reason to challenge the setting aside of the first report until his first-level supervisor made use of the opportunity of rewriting it to take a "swipe" at him instead of just acting in good faith and putting the procedural errors right. His last report was the first bad one he had ever had.

E. In its surrejoinder UNESCO presses its pleas and points out that the reporting officer gave a fuller assessment in the second report to explain why he abided by the E rating.

## CONSIDERATIONS

1. This case arises out of the decision refusing on grounds of poor performance to renew the complainant's fixed-term appointment.

A report was written on his performance from March 1990 to August 1991. As chairman of the Reports Board the Deputy Director-General for Management found a procedural flaw in it and asked the reporting officer to rewrite it. The second report made much more of the complainant's shortcomings. His second-level supervisor and the Reports Board approved it.

The Appeals Board thought it a breach of procedure for the chairman to have had the original report replaced, a matter which only the Board as a whole might decide. So it recommended allowing the appeal.

The complainant himself challenged the original report on formal grounds and rightly does not object to the writing of a new one.

It is also understandable that the chairman, on seeing an obvious oversight, pointed it out at once to the reporting officer before consulting the Board as a whole.

Besides, even supposing that the chairman had no authority to act as he did, the Board would in any event have approved what he had done: after all it took up the complainant's objections to the second version, and he has no quarrel with its doing so.

What is more, when a decision is reversed because it is not adequately explained, an official may not object to a new decision on the grounds that it is less favourable provided that the explanation for it is adequate.

So there is no formal flaw that warrants setting aside the second report and having yet another written by someone else.

2. The case law allows wide discretion both in appraising performance and in extending fixed-term appointments. The Tribunal will not interfere unless the decision was taken *ultra vires* or in breach of a formal or procedural

rule, or rests on a mistake of fact or law, or unless some essential fact was overlooked, an obviously wrong conclusion was drawn from the evidence, or there was misuse of authority: see Judgment 1546 (*in re* Randriamanantenasoa) and the precedents cited therein.

3. In the complainant's submission both the appraisal of his performance and the non-renewal based thereon show misuse of authority. Those decisions were taken, he says, not for the sake of the Organization's interests but because the reporting officer was hostile and wanted to get rid of him.

The evidence does not bear out that contention. The reporting officer's own supervisor, the Reports Board and the Director-General upheld the appraisal on the whole. Though the Board did not uphold the charge of disloyalty, that made no difference because the E ratings were confirmed anyway. Despite what the complainant says, there is no reason to treat the findings and appraisals in the report as mistaken. Although the Appeals Board found that he and his supervisor had been at odds, he had a duty as the subordinate to carry out his supervisor's instructions, and it was in the Organization's interests for him to do so. There was nothing wrong with his supervisor's reporting difficulties in that regard; indeed he was bound to do so.

Nor was there any misuse of authority in the writing of a fuller report the second time: it was plainly in the Organization's interest to have a properly full report with no formal flaw.

4. The conclusion is that the appraisal shows no fatal flaw and the Tribunal will not replace the Director-General's discretionary decision with an assessment of its own.

5. The complainant pleads that the text notifying to him the decision not to renew his appointment failed to state reasons.

Consistent precedent has it that a decision not to renew a fixed-term appointment must be notified to the official and the grounds for it must be valid and duly notified to the official so that he may appeal if he so wishes: see Judgments 544 (*in re* Bordeaux), 675 (*in re* Pérez del Castillo), 946 (*in re* Fernandez-Caballero), 1128 (*in re* Williams), 1154 (*in re* Bluske) and 1298 (*in re* Ahmad No. 2).

Here the complainant knew full well that the reason for non-renewal was his poor performance. That was obvious to him from the request for an appraisal, the notification of the report, the discussion of it by his supervisors and by the Reports Board, their recommendations, the notification of the start of proceedings to end his contract, the consultation of the Senior Personnel Advisory Board (SPAB) and the proceedings before that body. On getting the telex of 29 January 1993 he must have realised that the reason for the non-renewal notified therein was the poor quality of his services and that UNESCO had no exceptional reasons for keeping him on notwithstanding. So he was free to defend the charge properly, and indeed did so. UNESCO stated its reasons yet again in its pleadings in the appeal proceedings. So there was nothing wrong with its way of communicating them.

6. His pleas on the merits are that non-renewal was in any event unwarranted under the circumstances. His prospects for improvement were good, considering the too short period covered by the report: from March 1990 to August 1991 instead of the usual two years. His performance had been up to scratch for years: from 1976 to 1990. He never got the written warning required by the circular in force at the material time, namely No. 1743. He could have been put on another post in which he would have met expectations.

The gist of the defendant's reply is that his performance had already been below par for some time even though his reports had not said so. In 1981 he got an extension for only one year whereas he had been getting two years before that and got two years afterwards as well. There was no promise of any improvement in his conduct. The reporting period was normal for an appraisal of someone under contract that was requested for reasons of unsatisfactory performance. UNESCO tried to find him another post but failed mainly because of his training and experience. So it was in its interests to get rid of him.

(a) An organisation may not in good faith end someone's appointment for poor performance without first warning him and giving him an opportunity to do better. The warning need not contain express mention of the risk of termination if performance does not improve: the risk is implied. Nor need any later shortcomings be the same as those that prompted the warning: it suffices that the official understood that his performance as a whole must improve: see Judgment 1546 under18.

In his second report the Director of the Regional Office in Havana says that he pointed out each of the complainant's lapses in preparing a yearbook. In his letter of 21 October 1991 accompanying the original report he said: "I must point out that every time there was a problem Mr. Ricart-Nouel had a chance to go over it with me". There is no reason to doubt that assertion even though the complainant has challenged the content of the letter. Some of the difficulty seems to have been due to the complainant's unwillingness to brook his supervisor's authority. The Appeals Board spoke of "hostility" between the two and said they were in such utter disagreement as not to be able to stand each other.

The conclusion is that UNESCO gave the complainant due notice of his shortcomings orally and in writing, but to no avail. So the plea of lack of warning fails.

(b) The correspondence shows that the Director-General looked into the possibility of finding him another job but gave up for want of any available position that suited his skills and temperament.

(c) In taking his discretionary decision the Director-General had all the material evidence. Maintaining efficient service was foremost in his mind; and he did not err in taking the view that he had the information he needed, that no improvement was likely, and that termination was the right solution.

## DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Michel Gentot, Vice-President, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 30 January 1997.

*(Signed)*

WILLIAM DOUGLAS MICHEL GENTOT EGLI

A.B. GARDNER

Organisation internationale du Travail
*Tribunal administratif*

International Labour Organization
*Administrative Tribunal*

***Registry's translation,***
***the French text alone***
***being authoritative.***

# EIGHTY-SECOND SESSION

***In re* Souilah** **Judgment 1584**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. El Hadi Souilah against the World Meteorological Organization (WMO) on 17 May 1996, the WMO's reply of 14 August, the complainant's rejoinder of 16 September and the Organization's surrejoinder of 17 October 1996;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions;

Considering that the facts of the case and the allegations may be summed up as follows:

A. The complainant is an Algerian who was born in 1945. The WMO, whose headquarters are in Geneva, used to employ him at grade G.4.

On 1 March 1975 he got married in Geneva. Two children were born of the marriage. By a judgment of 9 March 1989 the court of first instance of the Republic and Canton of Geneva dissolved the marriage, gave the mother custody of the children and ordered the complainant to pay alimony for her and her children.

By a letter of 5 December 1990 the Permanent Mission of Switzerland to the International Organizations at Geneva informed the WMO of reports from the Cantonal Service for Advances and Recovery of Alimony (SCARPA) that the complainant was in default: he was 63,647 Swiss francs in arrears and SCARPA had had to lend 40,000 francs to his former wife. The Mission sought help from the Organization in getting him to pay up. By a letter of 21 December 1990 the Director of the Department of Administration of the WMO reminded him that standards of conduct required international civil servants to meet their legal obligations. On 29 April 1991 the Director told him that the Secretary-General saw his persistent default as serious misconduct.

By a judgment of 13 February 1992 a police court of Geneva sentenced him to three months' imprisonment, subject to five years' stay, for failing to pay the alimony and for misappropriating property under distraint. The judgment was confirmed by the criminal chamber of the cantonal court on 9 November 1992.

In 1992 and 1993 other creditors approached the Organization. They told the Personnel Division, among others, that he had defaulted on payments; they asked for his address; and they supplied a copy of a final demand they had sent him for payment before taking legal action. In a letter of 15 November 1993, prompted by yet another demand from an unpaid creditor, the Secretary-General ordered him to sort out his finances and warned that any further such grievances would lead to disciplinary action.

On 8 December 1993 the police court gave him another suspended sentence, to one month's imprisonment, for misappropriation of property under distraint.

In a letter of 18 January 1994 in reply to the Secretary-General's one of 15 November 1993 he said he would be "putting his financial situation to rights" within the next few months.

On 1 December 1994 the police court gave him further suspended sentences, to two months' imprisonment and to three years' expulsion from Switzerland, for default in payment of alimony, and revoked the stay of the sentence imposed on 9 November 1992. The cantonal court of Geneva upheld that judgment on 4 May 1995. By a judgment of 15 June, which again the cantonal court upheld on appeal on 23 October, the police court gave him suspended sentences, to one month's imprisonment and to three years' expulsion from Switzerland, for threat of assault against another member of the staff.

By a letter of 16 November 1995 the Director of the Resource Management Department told him that disciplinary proceedings were to be brought against him and that the matter would go to the Joint Disciplinary Committee. The Director informed him of the Committee's membership.

In its report of 12 January 1996 the Committee recommended dismissing him for repeated breach of the standards of conduct of the international civil service. It further recommended paying him, in accordance with Staff Rule 193.1(c), salary and allowances in lieu of the prescribed three months' notice and, in accordance with 193.2(c), a termination indemnity not to exceed one-half of the sum ordinarily due.

By a letter of 18 January 1996 — the impugned decision — the Secretary-General told him that he was dismissed as from 20 January under Rule 192.1(a). On 23 January his counsel asked the Secretary-General to suspend the dismissal and let him go straight to the Tribunal. On 31 January the Director of Resource Management replied that he had leave from the Secretary-General to do so. By a letter of 8 February counsel again asked the Secretary-General to suspend "the effects" of the dismissal, but on 4 March 1996 the Director answered that that request should be put to the Joint Appeals Board.

B. The complainant submits that dismissal, the harshest sanction of all, is disproportionate to his case.

His conduct within the Organization has never been at issue and for default on alimony a penal sentence is almost inevitable in Switzerland. No disrepute attaches to it: it is much like the penalty imposed for the careless driving of a motor vehicle. The complainant admits, however, that he was guilty of oversight in failing to apply promptly for a lowering of the amount of alimony set in the divorce decree.

He says that the dismissal came out of the blue. The Organization was lax: it should have punished him at once by withholding the amounts of alimony from his pay. Disciplinary action in 1993 or 1994 would have made him sort things out earlier. But in November 1995, when it brought the disciplinary proceedings, there was no recent cause for dismissing him: since October 1994 he had been meeting his financial obligations to his former wife and to his children and making obvious efforts to pay his other debts.

He contends that his dismissal defeats the purpose: if he has to leave Switzerland he will be further away from his children and unable to maintain them or repay SCARPA.

He asks the Tribunal to give the complaint "suspensory effect" and order his provisional reinstatement in the WMO and to quash the decision of 18 January 1996 and reinstate him with full entitlements. He has a subsidiary claim to payment of the full amount of the termination indemnity.

C. In its reply the Organization points out that the complainant was dismissed, not for serious misconduct under Regulation 10.1, but for unsatisfactory conduct. Regulations 1.1 and 1.5, which lay down the duties of international civil servants, and Regulation 4.2, which sets the criteria for recruitment, lay down general rules on the conduct of staff both within and outside the Organization. No one may so behave as to harm its good name or that of other staff. The complainant's conduct undoubtedly tarnished the reputation of the WMO and its employees.

Dismissal with notice was a fitting punishment for his serious lapses, especially since he had been warned several times what the outcome might be.

D. In his rejoinder the complainant denies that his running up debts offended against the standards of conduct of the international civil service. The Organization could have advised him in 1990 to try to have the amount of the alimony reduced and could have made monthly deductions from his pay. Though he was wrong not to pay any amount at all, the alimony was obviously far more than he could afford.

E. In its surrejoinder the WMO points out that its rules do not empower it to withhold any of a staff member's pay to discharge a debt incurred towards a third party. The complainant consistently refused offers of help from its social welfare officer. Besides, his failure to pay the alimony was only one of several reasons for dismissal.

## CONSIDERATIONS

1. The complainant used to be employed by the WMO. His last grade was G.4. For the month of May 1995 his pay came to 6,988.40 Swiss francs plus 1,051.35 in allowances; after deductions totalling 1,152.80 francs, for pension contributions, insurance premiums and the rental of a garage, he was left with 6,886.95 francs in take-home pay.

He got married in Geneva on 1 March 1975. By the marriage he had a son, born in Geneva on 19 May 1975, and a daughter, born, also in Geneva, on 5 September 1978. By a decree of 9 March 1989 the cantonal court of first instance dissolved his marriage, gave custody of his two children to their mother and ordered him to pay alimony which it set at 1,000 francs for each of his children and 700 francs for his former wife. The sums were to be indexed. He neither defended the divorce suit nor objected to the terms of the decree. He neither kept up the payments of alimony nor met other debts, such as bank loans, rent and bills from doctors.

When he failed to pay the alimony the Geneva Cantonal Service for Advances and Recovery of Alimony, known as SCARPA, lent sums to his former wife and sought to recover them from him. On 20 February 1990 it prosecuted him for default of maintenance under section 217 of the Swiss Penal Code. He promised the court that he would pay up but failed to do so. SCARPA referred the matter to the Permanent Mission of Switzerland to the

International Organizations at Geneva. In a letter of 5 December 1990 the Mission told the WMO that the canton had lent over 40,000 Swiss francs on the 63,647 due in alimony and had not recovered the sum. On 21 December 1990 the Organization wrote to remind the complainant of his duties towards both it and the host country. By a letter of 11 March 1991 the Mission again drew the WMO's attention to the complainant's debts. There ensued much written and oral discussion about his case between the Swiss authorities, including the Mission, and the WMO. Constant reminders from the Organization elicited no lasting improvement from him, and it warned him that he was at risk of disciplinary action. Creditors sued him; the court ordered him to make monthly payments into the Receiver's Office, he failed to do so, and the Office seized some of his assets. By a judgment of 13 February 1992, upheld on 9 November 1992 by the criminal chamber of the Geneva cantonal court a police court sentenced him to three months' imprisonment, subject to five years' stay of execution, for default of maintenance under section 217 of the Penal Code and for misappropriation of property under distraint in breach of section 169.

On 8 December 1993 the police court again gave him under section 169 a suspended sentence to one month's imprisonment for failure to pay into the Receiver's Office sums he owed to another creditor.

The complainant admits that he stopped paying alimony on 2 July 1993 on the grounds that his former wife would not let him see his children. That allegation, which is challenged, is not proved, and in any case infringement of visiting rights afforded no proper grounds for refusal to pay.

On 18 January 1994 he told the WMO that he had made arrangements to pay his debts. On 3 June 1994 the Secretary-General sent him a formal warning. On 19 July the Permanent Mission and representatives of the Organization met to discuss his case. On 1 September a further order of distraint was issued. On 10 October he signed an agreement with his former wife for payment of the alimony. He gave his bank standing instructions to pay 500 francs a month to SCARPA against the arrears.

Yet on 1 December 1994 the police court again sentenced him for default of maintenance under section 217 to two months' imprisonment and to three years' expulsion from Switzerland, both penalties to be subject to three years' stay of execution. It revoked the stay granted on 9 November 1992. The criminal chamber of the cantonal court upheld the sentence on 4 May 1995. The court stated that according to SCARPA the arrears came to 67,010 francs, whereas in a letter of 8 May 1995 the Mission said they totalled 159,450. The true figure remains unclear.

On 15 June 1995 the police court again gave him a suspended sentence under section 180 of the Penal Code to one month's imprisonment for threat of assault to another official, who had filed suit against him. The criminal chamber of the cantonal court upheld the judgment in substance on 23 October 1995. He made two applications for pardon but a legislative body of the Canton of Geneva (le Grand Conseil) dismissed them.

His landlord and his dentist approached the WMO about unpaid bills. It then came to light that the United Nations Staff Mutual Insurance Society had made him a loan to pay the dentist, but he had used the money to clear other debts. He offers the gratuitous explanation that he did so with the dentist's consent.

2. By a letter of 16 November 1995 the WMO told him that it was starting disciplinary proceedings which might lead to his dismissal for misconduct. His case went to the Joint Disciplinary Committee. The Committee met several times and gave him a hearing. In its report of 12 January 1996 it was unanimous that he had been guilty of breach of duty warranting dismissal and that that sanction would not be disproportionate to the offence.

3. The Secretary-General endorsed that recommendation in a letter of 18 January 1996 to the complainant dismissing him as from 20 January under Staff Rule 192.1(a), read together with Staff Regulations 1.1, 1.5, 1.10 and 9.2(a)(i). He applied for waiver of the internal appeal procedure and the Organization agreed.

4. The complainant's preliminary claims are to the suspension of his dismissal and to provisional reinstatement; his main claims to the quashing of the impugned decision and to reinstatement with full entitlements; and his subsidiary claim to payment of the termination indemnity in full.

He submits that his conduct, though no doubt remiss, must be seen in context: it was confined to his private life, his services being found satisfactory. Besides, dismissal was far too harsh a punishment for someone who had kept his commitments under the agreement of 10 October 1994. What he did was no worse than a traffic offence. The Organization failed to see him through hard times. The punishment is too severe also in the way it affects others: he cannot now meet his debts to his family and other creditors.

The defendant asks the Tribunal to uphold the complainant's dismissal. It observes that he fell deeply into debt, the Canton of Geneva had to lend large sums and he incurred several convictions. Such behaviour was quite unacceptable to the host country and so to the Organization. Despite many warnings his behaviour grew not a whit better but still showed serious shortcomings. There was nothing disproportionate in punishing him with dismissal. The Organization offered him the help of its social welfare officer but he declined. For all its forbearance he tried no harder; his latest convictions alone were damaging to his reputation in the host country and so to the Organization's interests.

*Receivability*

5. The Organization having waived the appeal procedure under Rule 1112.1, the internal means of redress are exhausted and the complaint is receivable under Article VII, paragraph 1, of the Tribunal's Statute.

6. By way of preliminary claim the complainant asks the Tribunal to suspend his dismissal so that he may stay in employment at least pending its judgment. According to Article VII(4) of its Statute a complaint has no suspensory effect and it is not empowered to make a ruling of the kind the complainant seeks. The claim is therefore irreceivable.

*The application for hearings*

7. The complainant has applied for the hearing of four witnesses: three members of the WMO's staff and his former wife. Since any material issue of fact or of law may be decided on the written evidence such hearing would serve no purpose. The application is therefore disallowed.

*The merits*

8. The impugned decision was taken under the Staff Regulations. Regulation 10.1 reads:

> "The Secretary-General may impose disciplinary measures on staff members whose conduct is unsatisfactory. He may summarily dismiss a member of the staff for serious misconduct."

The Organization submits that, having granted the complainant pay in lieu of three months' notice, it did not summarily dismiss him for serious misconduct under the second sentence of that provision: it dismissed him as a disciplinary sanction under Rule 1101.1(a) for failing in his duties as an international civil servant. And it cites the provisions that lay down those duties, namely Regulation 1.5:

> "Members of the secretariat shall conduct themselves at all times in a manner befitting their status as international civil servants. They shall avoid any action and in particular any kind of public pronouncement which may adversely reflect

> on that status ... they shall at all times bear in mind the reserve and tact incumbent upon them by reason of their international status."

Regulation 4.2 further declares the paramount consideration in the appointment of staff to be the need to secure the highest standards of efficiency, competence and integrity. And the Organization takes the quite proper view that it must follow the same criteria in deciding whether to keep someone on its staff.

Since those provisions offered a sufficient basis in law for the impugned decision, the material issue is whether the Organization applied them correctly.

9. Besides carrying out his allotted tasks an international civil servant has a duty to show such dignity of behaviour as not to harm the good name that the organisation must enjoy if it is to do its job properly. He must in particular abide by the law and respect the public order of the host state or of any other country it may assign him to. He must govern his private life accordingly, especially as it may touch on society at large: see, for example, Judgment 1501 (*in re* Cesari). Thus the Tribunal upheld the dismissal of an official who had complained about his organisation to the host country and accused another staff member of many offences (Judgment 63, *in re* Andreski); of one who had embezzled funds and run up debts (Judgment 79, *in re* Giannini); of one who kept reporting drunk for work (Judgment 207, *in re* Khelifati); and of one who had without consent set up a business of his own in the area of the organisation's work (Judgment 1363, *in re* Popineau Nos. 6, 7 and 8).

Here the complainant, though well paid, failed time and again, and quite improperly, to meet his financial obligations, in particular the payment of alimony to his family, and disobeyed orders by the Swiss courts and administrative authorities. The Republic and Canton of Geneva, where the Organization has its headquarters, had to lend large sums, of which he paid back only a small fraction. He caused loss to the canton, and that is the more objectionable in that he was paying no income tax. He got four prison sentences for offences against Swiss law — default of maintenance, misappropriation of property under distraint and threat of assault — which seriously disrupted public order. The Swiss Permanent Mission and his creditors approached the Organization many times, thereby putting it under the awkward obligation of acknowledging the misconduct of a member of staff. He made things worse by the threat to the other official. More than once he got money from the United Nations Staff Mutual Insurance Society to pay bills, yet used it for other purposes because he was in financial straits. He says that he did so with his creditors' consent. Whether that allegation, which is not proved, is true or false is immaterial.

He contends that the Organization failed to help him enough to meet his commitments after his divorce and to sort out his finances. He is mistaken: it is plain on the evidence that the Organization wanted the case to be disposed of. It offered him help but by and large he refused it.

He tries to belittle his misbehaviour by making out that the award of alimony by the divorce court was too high. Yet he neither defended the divorce suit, the decree being issued in his absence, nor later challenged the award on the grounds of any new fact. Had it been beyond his means, the Receiver's Office, when his property was distrained, and the court, in ruling on his default, might have proved more lenient. But the court rulings make it plain that he did not pay up even what he could have afforded; indeed at times he was paying no alimony at all. Since he was in default, it is immaterial whether, as SCARPA contended, he drew 400,000 Swiss francs from the sale of a flat in Spain.

In behaving as he did he obviously showed scant regard for his duties as an international civil servant and betrayed the Organization's trust. It was only reasonable that the WMO should consider that his conduct precluded keeping him on.

10. Though not denying misconduct, the complainant suggests that it was not serious, but much like a traffic offence, which would not warrant dismissal.

There is no merit in the argument. His repeated and partly wilful misconduct had nothing in common with traffic offences, which as a rule are occasional and often due to mere oversight.

11. The complainant pleads that the punishment was disproportionately heavy.

According to the rule of proportionality there must be some reasonable connection between offence and punishment, particularly when the official is dismissed on disciplinary grounds: see for example Judgments 937 (*in re* Fellhauer) under 14; 1070 (*in re* Couton) under 9; 1210 (*in re* Zaidi) under 7; 1250 (*in re* Peña-Montenegro) under 11; and 1363 (*in re* Popineau Nos. 6, 7 and 8).

There was no breach of the rule here. The WMO was free to conclude that its own interests required dismissing someone as neglectful of duty as the complainant. It allowed him a long time in which to improve, though to no avail, and thereby gave his own interests ample consideration.

He argues that, his conduct having been beyond reproach since October 1994, it is disproportionately severe to dismiss him for his earlier conduct, particularly as his family and other creditors are now at risk of getting nothing at all. The plea is irrelevant. For one thing, there is no evidence to suggest that he offered the Organization and all his creditors any sound arrangements for clearing off what he owed and kept to them; had he done so, his creditors and the Permanent Mission would no doubt have dropped the matter. For another thing, according to reports the Organization had after October 1994, his conduct had grown much worse. The conclusion is that it had good reason to believe that keeping him on was unacceptable and its Secretary-General did not exceed the bounds of his discretion in deciding on dismissal.

12. The complaint contains a subsidiary claim to payment of the termination indemnity in full and the complainant presses all his claims in his rejoinder. Yet he offers no argument in support of his subsidiary claim, even though the Organization's reply cites the material rules.

Under Rule 193.1 a staff member whose appointment is terminated is entitled to three months' notice, but the Secretary-General may instead grant him compensation in an amount to be reckoned according to the salary and allowances he would have been paid had the date of termination been at the end of the period of notice. But Rule 193.2 says that someone who is dismissed for misconduct may at the Secretary-General's discretion be paid an indemnity not to exceed one-half of the amount ordinarily due. The Organization maintains that the indemnity that the Secretary-General granted to the complainant was the maximum that the rules allowed.

The complainant rejoins that what he is challenging is not the substance of the rules cited but the way in which they were applied. But in that regard no challenge to the impugned decision is sustainable.

## DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Edilbert Razafindralambo, Judge, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 30 January 1997.

*(Signed)*

WILLIAM DOUGLAS E. RAZAFINDRALAMBO EGLI

A.B. GARDNER

***Registry's translation,***
***the French text alone***
***being authoritative.***

# EIGHTY-SECOND SESSION

***In re* Comlan (No. 2)** **Judgment 1585**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr. Guy Comlan against the World Health Organization (WHO) on 27 February 1996 and corrected on 15 March, the WHO's reply of 26 June, the complainant's rejoinder of 8 July and the Organization's surrejoinder of 17 October 1996;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. As was said in Judgment 1167 of 15 July 1992 on his first complaint, the complainant is a citizen of Benin and joined the WHO in 1969 as a doctor at grade P.4. The Organization gave him a career appointment in 1975.

After several postings in Africa it appointed him in 1988 director of studies at grade P.6 for the Faculty of Medical Sciences (FACSS) at the University of Bangui in the Central African Republic. He took up duty there in December 1988.

On 6 February 1991 the WHO's Regional Director for Africa, who was his first-level supervisor, wrote to him finding fault with the Faculty's training of doctors and asking for reform. In a report on his performance from 1 December 1990 to 30 June 1991 the WHO's Representative in the Central African Republic took him to task for poor initiative, a hum-drum approach to work and frequent absence from the country for reasons of health. The complainant rejected the charges in writing. In a memorandum of 29 November 1991 the Regional Director cited the report and called upon him to "act more responsibly so as to meet the Government's expectations".

In a report on his performance from 1 July 1991 to 30 June 1992 a new Representative commented that he did not get on well enough with other staff at the FACSS and there was poor coordination in running the Faculty between the WHO and the competent national departments. In a report covering the period from 1 July 1992 to 30 June 1993 the Representative said he had no comments to make on the complainant's work.

By a letter of 26 August 1993 the Minister of Health of the Central African Republic asked the Regional Director to have the complainant replaced on the grounds that: (1) he was unable to get on with the other staff and the students; (2) over half his work had not been done; and (3) he was absent so often on medical grounds that the work of the Faculty was suffering.

By a memorandum of 27 September 1993 the Director of the Support Programme of the Regional Office for Africa informed the complainant of the Government's strictures and asked him to submit comments to the Organization's Representative at Bangui and to leave the country as soon as possible. The complainant answered on 6 October. On 5 November he received through the office of the magazine *Jeune Afrique* in Paris a memorandum that the Director of the Support Programme had sent him on 22 October. It said that the Regional Director had recommended terminating his appointment under Rule 1070.1 for unsatisfactory performance and unfitness for international service. By a letter of 11 February 1994 a personnel officer of the Regional Office told him that the Director-General had decided to end his appointment at 1 June 1994.

On 24 May he appealed to the WHO's regional Board of Appeal at Brazzaville. In its report of 30 November the Board recommended rejecting his appeal. In a letter to him of 15 December 1994 the Regional Director endorsed the recommendation. On 15 February 1995 he sent notice of appeal to the headquarters Board of Appeal and on 9 March he submitted his brief. In its report of 30 November 1995 the Board recommended rejection. By a letter of 4 January 1996, the impugned decision, the Director-General informed the complainant that he endorsed the recommendation.

B. The complainant submits that the termination was wrongful. To send him the memorandum of 22 October 1993 through *Jeune Afrique* was an expedient intended to undermine his candidacy for the post of Regional Director, for which the Government of Benin was backing him. The WHO sent his personal file to the leaders of the African countries that were to elect the holder of that post. He denies that his work at the Faculty was below par. He is diabetic; the termination was unlawful because it was taken on grounds of his ill health, and was therefore discriminatory.

He seeks the quashing of the decision of 4 January 1996, reinstatement at the same grade, an award of a token "franc" in damages, and costs.

C. The WHO replies that it was in its own interests to end the complainant's appointment. It could not keep on someone whose work both his supervisors and the Government of the Central African Republic found "so wretched". His failure to get on with other staff shows that he was unfit for international service. The WHO had no malice in sending him the memorandum of 22 October 1993 through *Jeune Afrique*. In any case his difficulties in working in an international milieu came to light long before the election of the Regional Director for Africa; so there can have been no move to keep him out. He offers not a tittle of evidence in support of his plea of discrimination on grounds of health.

D. The complainant rejoins that the WHO offers no argument to gainsay his case, and he presses all his pleas.

E. In its surrejoinder the WHO contends that the termination of his appointment was in line with Rule 1070.1: his work was poor and he was unfit for international service. The decision served its interests and was actuated by no prejudice against him.

## CONSIDERATIONS

1. The complainant joined the WHO in 1969 as a doctor at grade P.4. He served in several African countries. In 1975 it granted him a career appointment at P.5 and assigned him to the School of Medical Sciences of the University of Niamey in Niger. In October 1979 the foreign ministry of that country asked it to replace him. In September 1980 it sent him to its Regional Office for Africa (AFRO) at Brazzaville. In 1985 it made him its representative in Gabon at grade P.6. In 1988 the foreign ministry of Gabon asked it to recall him after he had been accused in a television broadcast in that country of unlawful behaviour. On 28 December 1988 it appointed him professor and director of studies at the Faculty of Medical Sciences of the University of Bangui in the Central African Republic.

In a report dated 6 February 1991 the WHO's Regional Director for Africa said that doctors were being poorly trained at the Faculty. He called upon the complainant to do better. There was a report on his performance from 1 December 1990 to 30 June 1991. The Regional Director warned him on 29 November 1991 that his work was below par. In another appraisal report, signed in July 1992, he recommended withholding a within-grade salary increment from the complainant, but in one of June 1993 he recommended granting it. In a letter of 26 August 1993 the Minister of Health of the Central

African Republic asked the Regional Director to replace the complainant on the grounds that he could not get on with the other staff and the students and had left half his work undone, and that his frequent absences from the country on medical grounds were disrupting courses. Having been asked to comment, the complainant denied the allegations. The Regional Director advised ending his appointment under Staff Rule 1070.1. On 11 February 1994 the Director-General accordingly gave him notice of termination.

In a report dated 30 November 1994 the regional Board of Appeal, to which he had appealed, recommended rejection. The Regional Director endorsed the Board's recommendation on 15 December 1994, he went to the headquarters Board, and it too in a report of 30 November 1995 recommended rejecting the appeal. By a letter of 4 January 1996 the Director-General told the complainant he was endorsing that recommendation.

2. The complainant wants the Tribunal to quash the Director-General's decision, order his reinstatement at a grade no lower than the one he had before and award him "one franc in token damages" and costs. He pleads misuse of authority on the grounds that his work was up to standard. He says he fell foul of a plot to keep him from standing for Regional Director, a post for which his own country was willing to back him. He says that the memorandum of 22 October 1993 from the Director of the Support Programme notifying the recommendation of termination came to him in an unsealed envelope through the Paris office of the magazine *Jeune Afrique*. The purpose was, he submits, to undermine his candidacy, which was already public knowledge. The WHO's representative in Benin sent a "strictly confidential and personal" letter to the Minister of Health of that country, of which the President let him have the text in May 1994. To that letter were appended copies of "letters about [him] from the Governments of Niger, Gabon and the Central African Republic". The Regional Director said he thought them "worth bearing in mind". The complainant says that the same letter was sent to the heads of state and government and health ministers of the countries that were to be voting for the new Regional Director. The gist of his argument is that the Organization resorted to wrongful termination merely to get rid of a troublesome candidate. His work was good, he says; the impugned decision rested on plainly mistaken conclusions and offended against the Organization's own rules. That is evident from the commendation he got — for example in his report of June 1993 — just about the time of termination. The University of Bangui was happy with him and it was wrong to condemn his work as "wretched" without even asking the university people what they thought. It was an offence against French law — and the law of the international civil service

must say the same — to dismiss someone in poor health: he needed treatment for diabetes. The state of his health also exerted an unfair influence on the appraisal of his performance.

The WHO replies that the only reason for termination was the poor quality of his work, in which many warnings elicited no improvement. His ambition of becoming Regional Director is immaterial. His allegations of a plot do not square with the order of events: the television broadcast in Gabon was in 1988, long before the election of the Regional Director, and the information about him went out in 1994, after termination. It was just an oversight that he got the memorandum of 22 October 1993 through *Jeune Afrique*. He was not discriminated against on grounds of his health, which was good enough for him to pursue his career and had no bearing on the impugned decision.

3. The complainant held a career appointment.

WHO Staff Rules 1070.1 and 2 read as follows:

> "1070.1 A staff member's appointment may be terminated if his performance is unsatisfactory or if he proves unsuited to his work or to international service. It shall be considered unsatisfactory performance if the staff member does not or cannot perform the functions of the post to which he is assigned, and unsuitability for international service if he fails to establish satisfactory working relationships with other staff members or with nationals of other nations with whom he is working.
>
> 1070.2 Prior to termination action, a staff member shall be given a written warning and a reasonable time to improve. If there is reason to believe that the unsatisfactory performance results from assignment to duties and responsibilities beyond the capacity of the staff member, consideration shall be given to reassignment to a post more suited to his abilities."

4. Any termination calculated to get rid of an unwanted candidate for a position would offend against the Organization's interests and amount to misuse of authority.

But the complainant's contention on that score is gratuitous. He offers not a jot of worthwhile evidence to suggest that anyone on the Organization's staff sought to persuade the governments of the three African countries where he had served to state their disapproval of him. Though it is a pity that the memorandum of 22 October 1993 reached him through *Jeune Afrique*, he has proved neither malice on the part of anyone in the WHO nor actual injury. The forwarding of correspondence about the complainant to one or more African governments in 1994 may have been a questionable procedure. But it may be set down to a wish to let the electors have full information about one of the candidates. Whether the communication of such information was deliberate or not, there are in any event no grounds for inferring that the termination of the complainant's appointment rested on anything but his professional shortcomings and the WHO's requirements. No plot is proved.

5. The complainant argues that he needed treatment for diabetes. Since he is not saying that he was too ill to work, the treatment cannot in any event warrant extending his appointment: see Judgment 1494 (*in re* Mossu) under 5 and 6. What he seems to be contending is that the real reason for termination was his frequent absences for the purposes of the treatment and that the termination was wrongful on that account. But again his plea fails on the evidence. His ailments had nothing to do with the shortcomings that the Organization found in his performance. It is not even plausible, let alone proved, that the state of his health or the treatment were the cause.

6. (a) The complainant offers several pleas in rebuttal of the assessment of his performance.

It is true that he got a fairly good report in June 1993. But that did not preclude a less good one based on information that the WHO came by later. He was not working under tight and constant supervision by WHO officers but was on secondment to the University of Bangui as director of studies. So there was neither inconsistency nor bad faith in the WHO's relying on information that it got from the local authorities after the writing of the report of June 1993.

Though the WHO got no appraisal of his work from the management, faculty or students of the University, that was no fatal flaw that prevented it from forming an opinion of him. And though it was the views of the Government of the Central African Republic that prompted the termination, there is no reason to doubt that they reflected the truth and the views of the health ministry.

(b) There were in fact many charges against the complainant. The Central African Republic was the third country to seek his recall on the grounds of unsatisfactory performance or conduct; the reports on his work in Bangui in 1990-91 and 1991-92 were poor; he had had written warnings from the Regional Director; and the Government of the Central African Republic based its request on a detailed report.

The complainant has rejected all the charges against him. But there is no need to go over all the allegations on which the WHO founded its decision. The Tribunal is satisfied on the evidence, in particular the reports of the regional and headquarters Boards of Appeal, that the Director-General acted on the strength of reliable material and made proper use of his discretion in concluding that the complainant's performance was below par and that the Organization's interests required termination. After three unsuccessful postings in African countries there was plainly nothing wrongful in the WHO's ending the threat to its interests in that way.

(c) An appointment may ordinarily be terminated for unsatisfactory performance only if the organisation has issued a warning to no avail. One example of such a requirement is WHO Staff Rule 1070.2. But there is no need for the warning to point out the danger of dismissal or for the shortcomings that prompted it to be the same as those that may appear later: see Judgment 1546 (*in re* Randriamanantenasoa) under 18.

The WHO did issue warnings to the complainant and dismissed him only when they had proved of no avail.

7. Since his main claims fail, so must his claims to damages and costs.

## DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Michel Gentot, Vice-President, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 30 January 1997.

*(Signed)*

WILLIAM DOUGLAS MICHEL GENTOT EGLI

A.B. GARDNER

Organisation Internationale du Travail
*Tribunal administratif*

International Labour Organisation
*Administrative Tribunal*

***Registry's translation, the French text alone being authoritative.***

## EIGHTY-SECOND SESSION

## *In re* da Costa Campos

## Judgment 1586

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Arthur George da Costa Campos against the European Southern Observatory (ESO) on 15 December 1995 and corrected on 13 February 1996, the ESO's reply of 5 June, the complainant's rejoinder of 31 July and the Organisation's surrejoinder of 11 October 1996;

Considering Articles II, paragraph 5, and VIII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The ESO recruited the complainant, a Belgian who was born in 1943, in 1974 on a three-year appointment as a personnel officer at step 5 in grade 8. After two extensions it granted him an indefinite appointment on 15 June 1981. On 19 January 1982 it gave him an award for outstanding service. On 23 November 1988 it promoted him to step 10 in grade 9, as head of Personnel Administration and General Services as from 1 March 1988. He got a second award for outstanding service on 20 December 1989. The Director General promoted him to step 4 in grade 10 on 17 December 1992.

The post of head of Personnel was vacant from the end of July 1980 to August 1993, except from January 1985 to April 1986. In March 1993 the complainant applied for it but the ESO said that he was not qualified.

By a letter of 1 December 1994 the Director General told him that he was dismissed under Article R II 6.01 i) of the Staff Regulations, which allowed dismissal "for other specified reasons, related to the exercise of functions". The letter said that though his appointment was to expire at 1 July 1995 he would stop work on 2 December 1994, the date of notice of dismissal. He would be on special paid leave during the period of notice and was to remove all his belongings from his office by five o'clock on that day. The reasons given were that for over a year he had been failing to carry out his main tasks properly, had got on badly with his first-level supervisor, the head of Personnel, and by his behaviour had marred the Organisation's standing and good name.

On 10 January 1995 he told the Director General that he was appealing against the decision. By a memorandum of 20 February the head of Administration passed on his appeal to the Joint Advisory Appeals Board on the Director General's behalf. In its report of 18 May the Board held that the ESO had failed to show good cause for the dismissal. It recommended reinstatement in the Personnel Department.

The outcome of the talks that ensued was that the ESO made him an offer of a termination indemnity equivalent to almost 58 months' pay, but the complainant turned it down.

In a letter of 19 September 1995, the impugned decision, the Director General upheld his decision of 1 December 1994.

B. The complainant alleges breach of due process in that he was not allowed his say before dismissal.

He answers the criticisms of his performance and conduct and submits that the ESO drew clearly wrong conclusions from the evidence.

It was, he says, in breach of good faith: it tried, after the event, to trump up a case and concocted serious and gratuitous accusations against him.

It was in breach of its duty not to cause its staff unnecessary or undue injury and to respect their dignity and good name. In support of this allegation he cites the circumstances of dismissal, the Director General's harsh words about him on the very day he was told of it and the ESO's almost insulting submissions to the Appeals Board.

He pleads abuse of process and misuse of authority and submits that he has sustained serious material and moral injury.

He asks the Tribunal to quash the impugned decision, order his reinstatement as from the date of termination or, failing that, award him damages for loss of earnings and pension. He seeks moral damages and costs.

C. In its reply the ESO explains why it decided not to keep the complainant on. Since failing in August 1993 in his application for the post of head of Personnel he had been prickly about anything he saw as a slight on his ability; he had ideas of his own about staff management and did not take kindly to applying the Observatory's policy under orders from the head of Personnel, whom he made out in his internal appeal to be a bungler. Keeping him on would have hampered the Personnel Department's main work. The ESO's interests must prevail over his and for that reason, in its submission, the impugned decision must stand.

The ESO contends that the indemnity it offered him was fair redress. Article R A 11.01 i), 2) of the Regulations empowers the Director General, where someone is dismissed "for other specified reasons related to the exercise of functions", to grant at discretion an indemnity not to exceed the amount due where a post is abolished.

D. In his rejoinder the complainant points out that a decision is to be set aside, not because an organisation's interests so require, but because it is unlawful. By failing to answer the complainant's legal arguments the ESO concedes the unlawfulness of the impugned decision. What is more, it has "paid no heed to the Appeals Board's conclusion that the original decision to terminate showed procedural and substantive flaws". There was nothing fair about its final offer of compensation: he would have got no more had the termination been lawful. The offer covers neither the loss of pay and pension nor the serious moral injury.

E. In its surrejoinder the ESO maintains that reinstatement would be contrary to its interests and its offer of compensation was quite fair. In its submission there is ample redress for any moral injury in letting the complainant have several years' pay without requiring him to work for it.

## CONSIDERATIONS

1. The complainant joined the ESO on 8 July 1974 as a personnel officer at step 5 in grade 8. He had his contract renewed several times and on 15 June 1981 got a permanent appointment. He was promoted on 23 November 1988 to head of Personnel Administration and General Services at step 10 in grade 9 and on 17 December 1992 to step 4 in grade 10 on the same post. He had his second promotion confirmed on 10 February 1993 by a new Director General. He applied for the vacant post of head of Personnel but in August 1993 the ESO appointed someone else. In October 1994 it also appointed a new head of Administration. In planning administrative reforms it came to the view that for the sake of efficiency the complainant would have to go.

In a letter of 1 December 1994 the Director General cited Article R II 6.01 i) of the Staff Regulations and told him that he must clear out the very next day, 2 December, though his appointment would not end until 1 July 1995.

The complainant gave notice of appeal and the Director General put his case to the Joint Advisory Appeals Board. In their fully reasoned report of 18 May 1995 the Board were of one mind that the ESO had failed to show just cause for the termination; for want of a settlement by payment of a termination indemnity they recommended reinstating him.

The talks that the parties then started came to naught. On 19 September 1995 the Director General rejected the appeal on the grounds that the complainant's attitude and character made his presence useless; for one thing he had been critical of the head of Personnel; so it was in the ESO's interests that he should leave.

2. That is the decision the complainant is impugning. His claims are to the quashing of the decision, and to reinstatement or, failing that, an award of material damages, and to moral damages and costs. His pleas are that:

(1) he was given no prior hearing;

(2) clearly wrong conclusions were drawn from the evidence;

(3) there was breach of good faith;

(4) he sustained serious undue injury;

(5) the ESO failed in its duty of respect for the dignity and reputation of a staff member;

(6) there were breach of due process and misuse of authority.

The Organisation asks the Tribunal to dismiss the complaint. It does not challenge the Appeals Board's views. It admits to having had no legal grounds for dismissal but contends that the complainant's personality bars taking him back; so the only answer, and one allowed by Article VIII of the Tribunal's Statute, would be to award him damages for wrongful dismissal. It maintains the offer which it made him in the talks: though he turned it down, it went as far as the rules empowered the Director General to go.

3. So it is common ground, and indeed beyond dispute, that the termination was unlawful and cannot stand.

All that need indeed be said on that score is that the termination was decided in breach of his right to a hearing: for dismissal, see Judgment 1484 *(in re* Thuillier) under 8 and the precedents cited therein and, for changes in a staff member's status, see Judgment 1496 *(in re* Güsten) under 9 and 11 and the rulings cited. But the Tribunal may go into the merits too, since they are in no way to the detriment of the complainant's case. If the ESO wanted to get rid of him on the grounds of his shortcomings — though they were not especially serious anyway — it had a duty to warn him in what ways he fell short and give him the opportunity of doing better: see Judgment 1546 (*in re* Randriamanantenasoa) under 18 and the case law cited therein. The ESO failed to do so. Moreover, had his shortcomings warranted disciplinary action, he should have had the safeguards of disciplinary proceedings. It is wrong to deprive someone of those safeguards by resorting to some other procedure for termination that allows no right of defence: see Judgment 1496 under 8.

Lastly, the summary dismissal and the way in which the complainant had notice of it were quite irrelevant to the ESO's interests and were damaging to his dignity and good name: see again Judgment 1496 under 9 and 13 and the case law cited therein.

4. The termination being wrongful, what are the consequences for the complainant's appointment, and what damages is he to be awarded?

Under Article VIII of its Statute the Tribunal, "if satisfied that the complaint was well founded, shall order the rescinding of the decision impugned or the performance of the obligation relied upon"; but if such rescinding or performance is "not possible or advisable" the Tribunal will award the complainant compensation for the injury sustained.

Being unlawful on more than one count, the decision impugned in this case must be set aside.

The circumstances of each case determine whether redress is to take the form of reinstatement or an award of damages. Here, though the complainant must be made whole, that may be done by an award. It is doubtful whether it would be reasonable to order the ESO to take back someone who got on badly with other senior officers, especially when there may be little scope for finding him proper employment in an organisation of that size. Besides, in the talks the complainant did not rule out a financial settlement, even though there was no agreement on the amount.

The parties agreed that if the ESO had abolished the complainant's post it might under the material rules have awarded him the equivalent of 57½ months' basic pay in all: 46½ months' basic pay plus repatriation grants and pay for the period of six months' notice. The ESO offered to round the amount up to 58 months' pay. But instead of abolishing his post it wrongfully dismissed him. Taking account of his age and career prospects, the Tribunal holds that he will get fair redress in the award of the equivalent of 50 months' basic pay, plus repatriation grants and pay for the six months' notice, or a total of 61 months' basic pay. That amount covers the loss of all the entitlements of employment, including pay, pension, medical insurance and annual leave. Any sums already paid by the Observatory are to be subtracted from the total.

5. The ESO may choose between reinstatement and the award of such damages. Whichever option it may prefer, the complainant is further entitled, by way of compensation for the injury attributable to the sudden breach of contract, to an award of 50,000 French francs in moral damages. Since the complaint is allowed the Observatory shall also pay him costs.

## DECISION

For the above reasons,

1. The impugned decision is set aside.
2. The Observatory shall decide whether to reinstate the complainant.
3. If it does so, it shall reinstate him as from the date of the termination of his appointment.
4. If it does not, it shall pay him damages in the amount of 61 months' basic pay less any amounts already made over to him.
5. It shall pay him 50,000 French francs in moral damages.
6. It shall pay him 20,000 francs in costs.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Michel Gentot, Vice-President, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 30 January 1997.

*(Signed)*

WILLIAM DOUGLAS MICHEL GENTOT EGLI

A.B. GARDNER

Organisation internationale du Travail
*Tribunal administratif*

International Labour Organization
*Administrative Tribunal*

## EIGHTY-SECOND SESSION

***In re* Hill** **Judgment 1587**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Robin Anthony Hill against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 4 April 1996 and corrected on 18 April, Eurocontrol's reply of 26 July, the complainant's rejoinder of 1 September and the Agency's surrejoinder of 25 October 1996;

Considering Articles II, paragraph 5, and VII, paragraphs 1 and 3, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, who is British, joined Eurocontrol's staff in January 1992 as a senior technical officer at grade B3. He was assigned to the Agency's Experimental Centre at Brétigny-sur-Orge, in France. A motor accident that occurred on 13 February 1992 caused permanent damage to his sinus. By a memorandum of 14 September 1994 he told the Administration that his doctor had advised him on that account not to travel by air.

In August 1994 he applied for a post of project leader announced in a "vacancy notice/notice of competition", No. CE-94-AO/106 of 12 August 1994 at "grade A.5/A.6/A.7". By a letter of 15 June 1995 the head of the Recruitment Section told him that though the Selection Board had found him "suitable" the Director General had decided to appoint a candidate who suited the post "better".

By a letter of 11 September 1995 he lodged a "complaint" with the Director General under Article 92.2 of the Staff Regulations asking him to reopen the competition. He impugns the rejection he infers from Eurocontrol's failure to answer his claim.

B. The complainant submits that he was "more than qualified" for the post. The Administration should at least have interviewed him before appointing someone else. In any event it ought to have told him whether the reason why it was denying him promotion was his unfitness for air travel.

He wants the Tribunal to order "the reopening of Eurocontrol vacancy notice CE-94-AO/106, and the associated post" and a full explanation from Eurocontrol as to why it did not interview him for the post. He seeks a "statement confirming the limits on my future Eurocontrol career, including promotion, because of the Eurocontrol statement that I am not allowed to fly" and awards of material and moral damages.

C. In its reply Eurocontrol argues that the complaint is irreceivable on two counts: first, the complainant is now claiming "direct appointment" to post CE-94-AO/106 and other remedies that he omitted to seek in the past; and, secondly, his claims are "tantamount to requesting the Tribunal to issue orders to or even to supplant the Organisation".

In subsidiary comment on the merits the Agency observes that instead of arguing his case he merely describes the background and implies that he has a right to promotion. He has no such right. Nor was Eurocontrol free to give him duties he was plainly "unable" to carry out.

The Agency wants the Tribunal to order that the complainant pay "all costs".

D. In his rejoinder the complainant answers points of fact in the reply and offers further information about his case. He says he never claimed direct appointment to post CE-94-AO/106.

E. In its surrejoinder Eurocontrol comments on the rejoinder and presses its pleas.

## CONSIDERATIONS

1. The complainant joined the staff of the Organisation on 2 January 1992 as a senior technical officer at grade B3, step 1. He was assigned to subdivision B1.4, which is in charge of "simplified fast-time simulations" (SIMMOD), at Eurocontrol's Experimental Centre at Brétigny-sur-Orge.

2. On 13 February 1992 he suffered serious injury in a motor accident and is still suffering from the physical effects of it. Between then and 15 September 1995 he took some 290 days' sick leave.

3. By a notice dated 12 August 1994 Eurocontrol advertised a vacancy for a project leader at "grade A.5/A.6/A.7" in SIMMOD. The notice read:

> "An initial selection will be made on the basis of a first assessment of qualifications and experience of all candidates. Thereafter, those candidates considered suitable may be invited in a final selection procedure consisting of assessment and interviews. Further details will be given to candidates who are invited to participate."

The outcome of "initial selection" was a short list of two candidates. One of them was the complainant and the other an external candidate. By a minute of 5 December 1994 the head of the Recruitment Section at headquarters in Brussels sent the Director of the Centre the short list and asked him to "carry out interviews as appropriate".

4. It is not in dispute that the post carried duties similar to those the complainant was already performing, though it was at a higher grade. Nor is it in dispute that the other candidate was qualified.

5. On 14 September 1994 the complainant had told his superiors that an ear-nose-and-throat consultant had certified the tissue of his right sinus to be irreparably damaged and contributing to sinusitis and, to reduce the pain, had advised that he "should not fly in aircraft". The complainant had said, however, that he was "willing to accept the pain and inconvenience" to do his work at Eurocontrol. After further medical examinations and reports the Director of Personnel told him in a minute of 14 March 1995 that he had been found unfit to travel by air.

6. The complainant's duties required travel to many airports in Europe at which simulation exercises were conducted with local controllers of air traffic. He himself concedes that because of the ban on his travelling by air he could not discharge the duties of his old post and even had to be transferred in May 1995 to a department dealing with "real-time" instead of fast-time simulations.

7. By a letter of 15 June 1995 the head of the Recruitment Section informed him on the Director-General's behalf that he had not been selected for the post. Although the successful candidate had been interviewed he himself had not; and by a letter of 11 September 1995 he asked the Director-General to reopen the competition, contending that the failure to interview him was contrary to the rules. Having received no answer, he filed a complaint with the Tribunal on 4 April 1996 under

Article VII(3) of its Statute asking for the "reopening" of the vacancy notice and for the other relief set out under B above.

8. Although he had been put on the short list after the initial selection, it was obvious at the time of the final selection that he would be unable to perform the duties of the post. Interviewing him would have been a useless formality and might indeed have given him false hopes of success. As he admits in his rejoinder, he fully understood that because of the ban on his travelling by air he would be unable to do the work: it is common ground that travel by air was essential even though the notice of vacancy did not expressly say so. It is unnecessary to consider whether the failure to interview the complainant was in breach of the rules: even if it was he did not thereby suffer any actionable injury. His principal claim, to the reopening of the competition, therefore fails.

9. His claim to an award of damages fails because it is subsidiary to the principal one. His other claims are irreceivable because they fall outside the scope of his internal appeal and he has therefore neglected to exhaust the internal means of redress as Article VII(1) of the Tribunal's Statute requires.

10. In line with its consistent practice the Tribunal disallows the defendant's claim to an award of costs against the complainant.

## DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 30 January 1997.

Wm Douglas

WILLIAM DOUGLAS

Mella Carroll

MELLA CARROLL

MARK FERNANDO

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

A.B. Gardner

A.B. GARDNER

Organisation internationale du Travail
*Tribunal administratif*

International Labour Organization
*Administrative Tribunal*

***Registry's translation,
the French text alone
being authoritative.***

# EIGHTY-SECOND SESSION

***In re* Tuffuor (No. 2)
(Application for execution)**

**Judgment 1588**

THE ADMINISTRATIVE TRIBUNAL,

Considering the application filed by Mr. Kwame Amoako-Tuffuor on 26 February 1996, the reply of 5 April from the United Nations Educational, Scientific and Cultural Organization (UNESCO), the complainant's rejoinder of 10 July and the Organization's surrejoinder of 25 September 1996;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions:

## CONSIDERATIONS

1. UNESCO dismissed the complainant on 23 January 1990. Judgment 1251, on his first complaint, declared the dismissal unlawful. It ordered UNESCO to pay him an amount equivalent to four years' salary and allowances plus any sums due for "himself and his family in respect of repatriation from Nairobi to Accra". On 25 March 1993 the Organization paid him 229,470.98 United States dollars, made up of $215,768, the equivalent of four years' pay, and $13,702.98, the amount of the repatriation grant. He says that it has not properly executed the judgment: the sum paid included neither the expenses he had incurred for travel by himself and his family, nor education allowances for his children, nor his entitlements to home leave in 1989, nor compensation for annual leave accrued at the date of his dismissal.

2. UNESCO replies that his claims to travel expenses and education allowance, though receivable, are devoid of merit and that his other claims are irreceivable because they have nothing to do with the execution of Judgment 1251.

3. As to his travel expenses, the Tribunal did order UNESCO to pay the costs of repatriating him and his family. But despite its insistence he has never sent it receipts or tickets showing that he and his family did

actually go to Accra after his dismissal and, if so, when. All he has done is produce documents from Air France listing its fares and referred the Organization to travel agents in Nairobi. Those agents gave him an estimate of costs but have not confirmed that he actually made use of their services for his repatriation.

4. Though it has never denied owing him the costs of repatriation to Accra, UNESCO is therefore unable to refund them. Under rules of a kind common to all international organisations he has to give evidence of the exact amount of the expenses actually incurred. According to stamps in his passport he left Nairobi on 10 March 1990 and arrived in Ghana the same day. But that does not suffice to establish his own travel costs, let alone his wife's and children's. UNESCO is not thereby relieved of its debt to him. But on the present evidence, and until he submits the required proof, his claims under this head must fail.

5. So too must his claim to the payment of education expenses. Under Staff Rule 103.12 such sums are payable only on submission of receipts of amounts paid for expenses actually incurred. Having got from him no such evidence UNESCO need not include education expenses in the amount it reckoned it had to pay in execution of Judgment 1251.

6. He never put to the Appeals Board of UNESCO his claims to home leave entitlements and to compensation for accrued annual leave. The defendant contends that they are therefore irreceivable. In his first complaint he did seek an award of damages for unlawful dismissal and the amount of his end-of-service entitlements was not material. That issue being therefore a new one, he ought to have exhausted his prior remedies by lodging a separate internal appeal. But there is no need to entertain UNESCO's objections to receivability. By a decision of 9 June 1996 it paid $3,224.23 into the complainant's bank account in compensation for, among other things, the score of days of annual leave he was entitled to. So he has no cause of action on that count. As for home leave he never took, there is plainly no question of any refund by the Organization of fictitious expenditure. The amount that UNESCO paid the complainant in execution of Judgment 1251 did not have to include any such payment.

7. UNESCO has waived a claim to payment of $15,529.30 which it said he owed it and has waived deduction of that amount from the sums due to him. So his comments on that score are immaterial.

8. Nor can he succeed in his claim to damages for UNESCO's alleged lack of goodwill and good faith in dealing with his case. The

**Tribunal is satisfied that UNESCO has duly and promptly executed Judgment 1251. He has only himself to blame for the consequences of his own failure to produce the evidence that it requires before making him further payments.**

## DECISION

**For the above reasons,**

**The application is dismissed.**

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Michel Gentot, Vice-President, and Miss Mella Carroll, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 30 January 1997.

*(Signed)*

WILLIAM DOUGLAS MICHEL GENTOT MELLA CARROLL

A.B. GARDNER

Organisation Internationale du Travail
*Tribunal administratif*

International Labour Organization
*Administrative Tribunal*

*Registry's translation,*
*the French text alone*
*being authoritative.*

## EIGHTY-SECOND SESSION

***In re* de Assis**

**Judgment 1589**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Miss Sérafina de Assis against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 30 January 1996 and corrected on 22 April, UNESCO's reply of 17 May, the complainant's rejoinder of 16 July and the Organisation's surrejoinder of 27 August 1996;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and disallowed the complainant's application for hearings;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a citizen of Angola who was born in 1940, joined UNESCO on 6 October 1977. She held a one-year appointment at grade P.2 in the Division of Human Settlements and Socio-Cultural Environment and had it extended several times. In 1988 UNESCO froze her post for lack of money. Having failed to find her another job, it decided on 23 September 1988 to end her appointment but postponed doing so because she was by then in poor health.

By a memorandum of 15 November 1988 the acting Director of the Bureau of Personnel offered her on the Director-General's behalf six months' special leave with pay and then agreed separation as from 15 May 1989. She accepted the offer on 21 November 1988 but reneged in letters of 9 February and 14 April 1989. On 5 May 1989 she submitted a doctor's certificate. The upshot was that UNESCO gave her several short extensions. Having used up her entitlements to annual leave and to sick leave on full pay, she was put from 27 April 1990 on sick leave at half pay and from 8 December 1990 on special leave without pay. Under Article 15.1.1 of its rules, however, the Medical Benefits Fund paid her the equivalent of half pay.

On the advice of its medical officer UNESCO asked its Staff Pension Committee on 28 February 1991 whether she might get a disability benefit. The Committee decided to grant her the benefit as from 8 December 1990. The Organization informed her in a letter of 27 July 1992 signed by the chief of the Personnel Administration Division that her case would be put to a personnel advisory board to see whether her appointment was to be terminated on grounds of ill health.

By a letter of 14 August 1992 the complainant said she would like to appear before the board, but the chief of the Personnel Administration Division told her in a letter of 18 November that on medical advice her request was refused. The Senior Personnel Advisory Board (SPAB) met on 27 November and recommended the termination of her appointment on grounds of ill health.

By a letter of 14 December 1992 the Director of the Bureau of Personnel informed her that her appointment was to be terminated under Staff Regulation 9.1 for reasons of health as from 7 December 1990, the disability pension having been granted to her as from the 8th; he said that she was also entitled under Staff Rule 109.7(a) and (b) to a termination indemnity equivalent to "eleven and one-twelfth months of pay, less the amount of the disability pension paid for the corresponding months by the United Nations Joint Staff Pension Fund".

By a letter of 9 February 1993 she lodged an internal "complaint" with the Director-General against that decision. By a memorandum of 26 February she filed notice of appeal with the secretary of the Appeals Board. By a letter of 5 March the Director of the Bureau of Personnel told her that the Deputy Director-General confirmed the decision on the Director-General's behalf. In her brief dated 29 October 1993 she also said that the Organisation had downgraded her post from P.3 to P.2 and refused her any further step in grade. In its report of 27 June 1995 the Appeals Board recommended that the Director-General reverse his decision on the grounds that Staff Rule 109.7(b) did not allow retroactive termination. In a letter of 30 October 1995 — the impugned decision — the Director-General rejected that recommendation but in a departure from practice allowed her claim to the refund of the costs of travel on home leave in 1984.

B. Citing Rule 109.11(a), which is about the date at which termination takes effect, the complainant objects to the retroactive termination of her appointment. The regular extensions she got after 27 April 1990 and her correspondence with UNESCO show that there was never any question of retroactive termination.

To dock the termination indemnity offends against the rules of the international civil service. Such indemnity being a form of compensation, UNESCO may not make deductions from it which have nothing to do with compensation, particularly since she has to pay back to the Medical Benefits Fund the sums it let her have from 8 December 1990, when she went on half pay.

She asks the Tribunal to quash the impugned decision, save as to the refund of the costs of her travel on home leave in 1984; to award her compensation in lieu of three months' notice, termination indemnity equivalent to twelve months' pay, two months' pay in lieu of home leave, fourteen weeks' pay by way of repatriation grant, and the "amounts set out in her original claim".

C. In its reply the Organization submits that the complainant's claims that are not directly linked to the impugned decision are irreceivable, both because they are time-barred and because she has failed to exhaust her internal remedies.

It denies owing her three months' pay in lieu of notice: the indemnity due to her is for three months' leave without pay. The termination indemnity she is entitled to under Rule 109.7(a) is not twelve months', but eleven and one-twelfth months' pay since she had only thirteen years and two months' service. The repatriation grant she claims was refused because she failed to qualify for it under Rule 109.9(h). As for compensation for accrued annual leave, it came to 18½ days and UNESCO has already made it over to her.

The Organization ended her appointment under Regulation 9.1 and Rule 109.7(b), which allow retroactive termination from the date from which disability benefit was due. Rule 15.1.3 of the rules of the Medical Benefits Fund requires her to pay back to the Fund the sums it let her have in half pay from 8 December 1990.

D. The complainant enlarges on her pleas in her rejoinder. She describes the retroactive termination as "monstrous". There was breach of due process in not letting her attend the SPAB's meeting. She acknowledges, however, that she no longer has any reason to claim the repatriation grant.

E. In its surrejoinder UNESCO presses its pleas, maintaining that she was refused leave to appear before the SPAB by virtue of paragraph 8 of its own rules and on medical advice. As for the docking from the termination indemnity of the amount she owed in disability pension under Rule 109.7(b), UNESCO points out that it is bound to apply the Staff Rules and Regulations: *patere legem quam ipse fecisti.*

## CONSIDERATIONS

*The facts*

1. The complainant joined UNESCO on 6 October 1977. She held several posts at grade P.2 and reached step 10 in that grade.

In 1988 her health declined. Having used up her entitlements to sick leave at full pay, she was put on leave with half pay as from 27 April 1990. As from 8 December 1990 she was on leave without pay but got amounts equivalent to half pay from UNESCO's Medical Benefits Fund. On 9 February 1992 she signed the following statement:

> "I, Serafina de Assis, hereby promise to pay back to the UNESCO Medical Benefits Fund any amounts paid to me under Article 15 of its rules if the United Nations Joint Staff Pension Fund grants me retroactive payment of periodic benefits."

Rule 15.1.3 of the Fund's rules reads:

> "The half remuneration provided for under this Article in the event of temporary incapacity shall not be paid concurrently with an early retirement pension or a disability benefit from the United Nations Joint Staff Pension Fund; however, if that pension or benefit amounts in full to less than half the remuneration of the participant concerned, the Fund shall grant a benefit to make up the difference."

By a letter of 27 July 1992 the Personnel Administration Division told the complainant that UNESCO proposed ending her appointment on grounds of ill health after consulting a personnel advisory board since its Staff Pensions Committee was granting her a disability benefit under Article 33 of the Regulations of the United Nations Joint Staff Pension Fund.

In correspondence it reminded her — and she did not object — that in keeping with usual practice she would have to pay back the sums made over in half pay from the Medical Benefits Fund if she received disability benefit for the same period.

The Senior Personnel Advisory Board (SPAB) met on 27 November 1992. On the chief medical officer's advice the complainant was not allowed to attend.

2. A letter of 14 December 1992 from the Director of the Bureau of Personnel and a personnel action form (93-HQ/02) told her that her appointment was terminated for reasons of health under Staff Regulation 9.1

as from 7 December 1990. Ten notices of personnel action having been retroactively reversed, she became entitled to:

$18^{1/2}$ days' pay in lieu of annual leave;

$11^{1/12}$ months' pay as termination indemnity under Rule 109.7(b), less the amounts paid by the United Nations Joint Staff Pension Fund in disability benefit for the corresponding months;

$4^{1/3}$ weeks' pay as repatriation grant for the period from 6 October 1977 to 30 June 1979, payment of any further amount due under this head up to 7 December 1990 ($11^{2/3}$ weeks) being subject to Rule 109.9(h).

Rule 109.7 states:

> "Indemnity of termination
>
> (a) Upon termination under Regulation 9.1 of an indeterminate appointment, or of a fixed-term appointment after six years or more of service, owing to the abolition of a post or reduction of staff, a termination indemnity, calculated on the basis of the number of years and months of service completed, shall be payable in accordance with the following schedule …
>
> (b) The same indemnity shall be payable in the case of termination for reasons of health under Regulation 9.1, except that its amount shall be reduced by the amount of any disability benefit the staff member receives for the corresponding months from the United Nations Joint Staff Pension Fund."

The complainant lodged an internal appeal against the decision of 14 December 1992.

Against the Appeals Board's recommendation the Director-General rejected the appeal in a letter he sent her on 30 October 1995. But he said that in the circumstances he agreed to the Organization's refunding the costs of her travel to Lisbon and back on home leave in 1984, political unrest and civil war having prevented her from going to Angola.

3. She is now challenging the decision of 14 December 1992 as confirmed on 30 October 1995 on appeal. She submits that the retroactive termination of her appointment was unlawful. Though she does not object to termination on grounds of ill health, she believes that she should have been given due notice. She claims payment of the full termination indemnity without deduction of the disability benefits from the United Nations Joint Staff Pension Fund. UNESCO still owes her sick leave. She admits that she is too late to claim repatriation grant; she contends that the Medical Benefits Fund did not cover the costs of her medical treatment from 1990 to December 1992. She believes that the Organization ought to have granted her promotion.

The Organization submits that her claims to promotion are irreceivable because they are out of time and she has therefore failed to exhaust her internal remedies. Several claims cannot be at issue. Thus the Director-General has agreed to meet the costs of her travel on home leave in 1984. She has accepted liability for repayment of the disability benefits from the Medical Benefits Fund. And she has acknowledged she is out of time in claiming the repatriation grant. As for her objections to retroactive termination, the Organization answers that it is required by Rule 109.7 and is in line with precedent: Judgment 595 (*in re* Benyoussef).

*Receivability*

4. The complainant's claim to promotion is irreceivable because it is out of time and she has failed to exhaust the internal means of redress. UNESCO has met her claim to repayment of the costs of travel to Lisbon and back. And refund of the sums made over to her in half pay by the Medical Benefits Fund is no longer at issue since she has undertaken to repay them.

So the only material issues are her objections to retroactivity, her claim to compensation in lieu of notice, the reckoning of her termination indemnity — as to the relevant period and the sums to be deducted — and compensation for accrued leave.

The SPAB proceedings are irrelevant since she is not challenging termination as such. So there is no need to entertain her objection to not letting her appear before the SPAB.

*The merits*

5. There is a rule of international civil service law that forbids retroactive change in the legal status of staff save in circumstances that are immaterial here. A decision may alter their status only for the future and after they have had due notice: see Judgments 51 (*in re* Poulain d'Andecy) under 5; 963 (*in re* Niesing, Peeters and Roussot), again under 5; 1012 (*in re* Aelvoet No. 2 and others) under 6; 1020 (*in re* Saunoi) under 12; 1130 (*in re* Godin and others) under 2; 1530 (*in re* Haenni and Perruchi-Haenni) under 8; and 1531 (*in re* Wassef No. 9) under 8. That, too, was the thrust of Judgment 595: the rule meant — said the Tribunal — that termination for reasons of health affected only the complainant's future and must be duly notified; yet an organization might go back to a date prior to that of termination to see whether it was warranted for reasons of health, since that was obviously an issue it had to determine before taking its decision to terminate.

That rule holds good here. Indeed Rule 109.7 is quite in line: it does not say that the date of termination and the start of disability benefit must coincide, let alone that the termination must be retroactive as from the date already set for the start of the benefit. Rule 15.1.3 of the rules of the Medical Benefits Fund actually makes it plain that the two may overlap.

Confirming as it does the retroactivity of the termination of the complainant's appointment the impugned decision cannot stand. The termination as such is not at issue. The mere fact that the date set for termination was not the right one does not invalidate the whole decision: it may take effect from the date at which termination was valid. UNESCO must therefore set a new date for termination that observes the prescribed period of notice and reckon the complainant's entitlements accordingly. She does not deny liability for repayment to the Medical Benefits Fund of the sums it let her have in half pay. On that score she is right: the repayment is not an exception to the rule against retroactivity but the consequence of a decision that was conditional from the outset. But she argues that Rule 109.7(b) is unlawful in that it prescribes the deduction of disability benefit from the termination indemnity. On that score she is wrong: there is no rule requiring an organisation to pass on insurance benefits to a member of its staff.

One further comment is worth making about compensation for the period of notice: no compensation can be due for loss of pay in any period for which the Organization was not required to pay the staff member anyway.

The parties still disagree on the issue of accrued leave. The complainant says it came to two months, UNESCO to 18¾ days. In its surrejoinder the Organization submits that the burden is on her to show that it owes her for the greater number of days. Since the case is sent back, that issue too is referred so that the Organization may offer her the opportunity of discharging that burden.

6. The complainant is entitled to an award of costs, and the amount is set at 15,000 French francs.

## DECISION:

For the above reasons,

1. The impugned decision is set aside insofar as it took effect at 7 December 1990.
2. The case is sent back for the Organization to determine the complainant's entitlements under this judgment and to reconsider the issue of accrued leave.
3. The Organization shall pay her 15,000 French francs in costs.
4. Her other claims are dismissed.

In witness of this judgment Mr. Michel Gentot, Vice-President of the Tribunal, Mr. Edilbert Razafindralambo, Judge, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 30 January 1997.

*(Signed)*

MICHEL GENTOT E. RAZAFINDRALAMBO EGLI

A.B. GARDNER

*Registry's translation,
the French text alone
being authoritative.*

## EIGHTY-SECOND SESSION

***In re* Nies** **Judgment 1590**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Guy Léon Nicolas Nies against the European Patent Organisation (EPO) on 20 June 1995, the EPO's reply of 5 September, the complainant's rejoinder of 16 January 1996 and the Organisation's surrejoinder of 10 April 1996;

Considering Articles II, paragraph 5, and VII, paragraph 3, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a citizen of Luxembourg born in 1951, accepted a probationary appointment with the European Patent Office, the Secretariat of the EPO, for a "translator (terminologist)" that the Director of Personnel had offered him on 1 October 1991. He took up duty on 1 November 1991. According to the letter of appointment dated 14 October 1991 he was to serve in the Language Service of Directorate-General 4 (DG4) in Munich as a translator at grade A3. After extending the period of probation by six months the EPO granted him a permanent appointment on 1 May 1993.

By a note of 30 November 1994 the Director of the Service told the staff that someone else was to take over the complainant's duties as a terminologist and that he would thenceforth be working as a translator in the French section.

By a letter of 23 January 1995 he asked the President of the Office to reverse that decision or else treat his letter as an appeal.

In a letter of 15 February the Vice-President in charge of DG4 explained that the reason why the Director had set him to other duties was that his work on terminology was below par; so did he still want to appeal? In letters of 9 May to the President and of 10 May to the Vice-President the complainant answered that he did. By a letter of 21 June the Director of Staff Policy told him that his appeal of 23 January had been registered. By a letter of 3 July the chairman of the Appeals Committee informed him that it had got his appeal of 9 May on 21 June. But on 20 June he had filed this complaint with the Tribunal.

B. The complainant observes that by the date of filing he had had no "confirmation" of his internal appeal. So he believes he has exhausted his internal remedies. The EPO has wrongfully prevented him from exercising his right of appeal.

The Director of the Language Service acted *ultra vires*: she was not free to change his duties. In any event her note of 30 November 1994 neither amounted to the written communication of an individual decision which Article 106(1) of the Service Regulations requires, nor vouchsafed any explanation.

The announcement of his "transfer" was "vexatious" and impaired his professional reputation both inside the Office and outside it. He was not recruited to do translations and is not qualified for such work.

He asks the Tribunal to reinstate him in his post as "terminologist", quash all the decisions confirming the one he originally challenged and award him damages for material, professional and moral injury and 2,000 German marks in costs.

C. In its reply the EPO denies preventing the complainant from exercising his right of appeal. It points out that he has omitted to mention the letter that the Vice-President of DG4 sent him on 15 February 1995.

The Director of the Language Service did not act *ultra vires*, having been empowered by delegation to change his duties. The work he did on terminology was not what the translators and revisers needed; so he had to be assigned to another job in the Organisation's interests.

The description of the translator's post which he was recruited to refers to "manifold duties in the relevant field of language". That is why he came to be given the work on terminology. The letter of appointment dated 14 October 1991 shows that he was appointed translator, not terminologist. Besides, his personal records show that he did translations from 1986 to 1991; so how can he make out that he is not qualified for his new duties?

The Director of the Language Service had several talks with him to explain the reasons for the decision. The Vice-President too set them out in his letter of 15 February 1995. The complainant is wrong to regard as vexatious the announcement of his new duties since the note sent on 30 November 1994 to the staff of the Language Service did not give the reasons for the change.

D. In his rejoinder the complainant develops his arguments. He submits that a set of particular and consistent circumstances, which he recounts, shows that when the EPO took him on it wanted a terminologist. It did not, as it says, just give him new duties; it transferred him from the post for a terminologist, to which he had been recruited, to one for a translator. The duties of a terminologist are stated only in the description of a reviser's post, not that of a translator's.

In support of his plea that the impugned decision was unexplained he submits that, even if meant to explain it, the Vice-President's letter of 15 February 1995 contained inconsistent and wrong assertions. It cited a report on his performance in 1992-93, which is still subject to "conciliation" and therefore may not be relied on. The reason why the decision was taken was that the Director disliked him.

E. The Organisation presses its pleas in its surrejoinder and says that nothing in his rejoinder makes it alter them.

## CONSIDERATIONS

1. The complainant joined the European Patent Office on 1 November 1991.

By a decision of 14 October the President of the Office granted him a probationary appointment "as a translator at Directorate-General 4 in Munich" at grade A3. After having the probation extended by six months he got a permanent appointment. In an official document supplied by the defendant the post of a grade A3 translator is described as follows:

> "To carry out his duties the official must have broad professional practical experience and a university education qualifying him to perform duties in the relevant field of language. He will be working mainly on his own within a team.
>
> He will be expected to carry out language work under general instructions. He must do any research required and produce good accurate translations that call for little revision.
>
> He may be called upon to coordinate the work of a small group."

The complainant had applied for the post in answer to a newspaper advertisement. It said that the Office had openings for English. French and

German translators and revisers and that one of them required a keen interest in computers for work on terminology, among other things. The complainant had a relevant university doctorate and experience and had done translation. From the outset he worked as a terminologist to set up a database, but the description of his post was never changed.

There was disagreement over what he should be doing. He leaned to an academic approach whereas what the translators and the Director of the Language Service wanted was a means of helping them to do their work. The Director decided, while keeping him on his post, to set him to translation in the French section. She told him so on 25 October 1994 but he objected. By a note of 30 November she told the staff of the Service that thenceforth Mr. Jean-Noël Blancard, who had been with the Office for years, would be in charge of terminology and the complainant would be working as a translator into French.

By a letter of 23 January 1995 he asked the President of the Office to set aside the Director's decision. He said he had "at least" three objections: the Director had acted *ultra vires*; the decision had not been notified properly and in person; and it was unexplained. He said that, if the President refused, his letter was to be treated as notice of appeal.

In a letter of 15 February the Vice-President in charge of DG4 gave him the reasons for the change in his duties, one being that his work had not come up to expectations, and asked whether he still intended to appeal.

On 10 May 1995 the complainant replied that he did. He had pointed out the day before in a letter to the President that the deadline in Article 109(2) of the Service Regulations had long gone by and he had said that if he got no notice of referral to the Appeals Committee under Article 109(1) he would be appealing to the Tribunal. On 21 June the Director of Staff Policy wrote to say that his letter of 23 January 1995 had been registered as an appeal, and the Chairman of the Appeals Committee informed him on 3 July that on 21 June it had received a copy of his appeal of 9 May.

2. In his original brief the complainant puts the same three pleas to the Tribunal. He therefore asks it to set aside the implied decision rejecting his appeal, order his reinstatement as a terminologist and award him damages for material, professional and moral injury and costs.

In its reply the Organisation admits that he has exhausted his internal remedies. It refutes all his pleas: the Director of the Language Service did have authority to give him other duties on the same post; he was himself told of the decision, both orally and in writing; and it was properly accounted for, since the Organisation told him the reasons for the change of duties. The EPO explains that his poor performance required the change.

In a rejoinder of 73 pages he retorts that his work was beyond reproach and the criticisms of him unfounded and he restates his objections to the decision.

In its surrejoinder the Organisation submits that in his rejoinder he is relying on new facts and pleas that appeared neither in his internal appeal nor in the original brief he addressed to the Tribunal.

3. It is common ground that the complaint cannot be declared irreceivable because of any failure on his part to pursue the internal appeal procedure. It is indeed receivable under Article VII(3) of the Tribunal's Statute.

Although he might at the outset have challenged the decision on the merits, only in his rejoinder has he done so. Yet the case law allows the submission of new pleas both in the complaint and in the rejoinder: it is only new claims that may not be made: see for example Judgments 429 *(in re* Gubin et Nemo) under 1; 522 *(in re* Nielsen) under 18 and elsewhere; 960 (*in re* Cuvillier No. 2) under 8; and 1019 (*in re* Barahona No. 2 and Royo Gracia) under 10. Both in his internal appeal and before the Tribunal the complainant has claimed the quashing of the decision to change his duties. He claims no more in his rejoinder, even though some of his pleas are new. Those pleas are therefore receivable.

4. A strong line of precedent has it that a decision determining a staff member's duties is at the discretion of the executive head of an organisation and as such is subject to only limited review by the Tribunal. It may be set aside only if it is *ultra vires* or in breach of a rule of form or procedure, or shows some mistake of fact or of law, or has overlooked some essential fact, or if some obviously wrong inference has been drawn from the evidence, or if there is misuse of authority. Moreover, the Tribunal will be especially cautious in this area and will not seek to replace an organisation's assessment of a staff member's abilities with its own: see for example Judgments 1496 *(in re* Güsten) under 7 and 1556 *(in re* Leprince No. 2) under 5. Further caution is called for, too, where the issue is not transfer but the determination or alteration of the duties to be performed on a given post. Here the duties required of the complainant are

not different from those provided for at the date of recruitment, the Organisation enjoying the widest discretion in matching duties to needs.

It is true that what the letter of 1 October 1991 offered the complainant was a "probationary post as translator (terminologist) at Directorate-General 4", and what the Office then had in mind for him was work in terminology. Yet there was no change in the description of the post: so much is clear from the text of the advertisement, the letter of appointment and the document quoted in 1 above describing a translator's duties.

5. Judgments 1103 *(in re* Schulz No. 2) and 1146 *(in re* Galichet) ruled on issues raised by a change in a translator's duties, but not in his post, in the EPO's Language Service. What they said has a bearing on this case too.

The complainant contends that what the impugned decision entailed was really transfer and a change of post. He is mistaken. The duties of a post are determined by the description of it in the letter of appointment and by any later changes: see Judgments 1103 under 3 and 4 and 1146 under 4 and 7.

The complainant's letter of appointment said that he was to perform the duties of a translator. The description of his post was not changed thereafter. The table of EPO posts does not include any for a terminologist. He says that the parties' clear intent was to put him on such a post. Again he is wrong. He must have realised that the Organisation creates a post by express decision, and that he himself was put on a translator's post even though he was set, at least to begin with, to work on terminology. The post description made it plain that the Organisation might give him other duties without changing his post. The Organisation would obviously not have wanted to forfeit the possibility of doing so, should its interests so require, without changing the post description, which would have meant a decision by the competent authority.

6. Since the change of duties, still on the same post, was no transfer Article 12(1) of the Service Regulations did not apply and the Director of the Service did have authority to take the decision: see Judgment 1146 under 4 and 7. The description of the duties of a director at grade A5/L5 includes authority to "manage an administrative unit covering several specialised areas of work" and "the issuance of instructions on the running of the unit".

7. Article 106(1) of the Service Regulations says that any decision adversely affecting a person shall state the grounds on which it was based: see also Judgment 899 *(in re* Geisler No. 2 and Wenzel No. 3) under 17. But that provision does not require the Organisation to state them in the actual text notified to the staff member. All that is required is that he be aware of them so that he may — for one thing — challenge them on appeal. He may learn of them from some other document, or from prior proceedings, or orally, or even later in answer to his objections: see for example Judgments 544 *(in re* Bordeaux), 675 *(in re* Pérez del Castillo), 946 (*in re* Fernandez-Caballero), 1128 *(in re* Williams), 1154 *(in re* Bluske) and 1298 *(in re* Ahmad No. 2).

In this case the requirement was met: the Director explained the reasons orally to the complainant and they tallied with earlier comments, including some in reports on his performance. The Vice-President in charge of DG4 confirmed them in his letter. Indeed the complainant himself does not accuse the Organisation of withholding the reasons for the decision.

The plea therefore fails.

8. For the same reasons so does his plea that the decision was not properly notified: it was conveyed to him orally and in writing and confirmed by the Vice-President later.

9. He contends that it was improper of the Organisation to accuse him of unsatisfactory work without bringing disciplinary proceedings which would have afforded him safeguards; he was denied his right of reply and suffered a hidden disciplinary sanction.

The Organisation has never accused the complainant of any sort of conduct warranting disciplinary action but merely of poor performance. So the change in his duties did not amount to a hidden disciplinary sanction: see for example Judgments 1496 under 8 and 1546 *(in re* Randriamanantenasoa) under 13.

10. As to the merits the complainant argues that the Organisation promised him permanent assignment to work on terminology and was therefore in breach of good faith. The plea is without merit. As was said in 5 above the description of his post was not changed. As he must have realised, it was not in the Organisation's interests to forgo the possibility of giving him more useful duties. Besides, there is no evidence to suggest that the EPO made him any such specific promise.

11. Judgments 1103 and 1146, which were also about the EPO's Language Service, upheld decisions by the Head of the Service to allot by rotation among the staff the duties of head of each language section. It ruled that the exercise of those duties did not confer tenure and there had been no misuse of authority in so organising the work. This case is comparable. The Director switched the duties of two members of the Service by setting another translator to work on terminology and the complainant to translation proper. That may not have been what he wanted, but his supervisors had good reason to believe that it was what the Organisation's overriding interests demanded.

12. The gist of the complainant's case is that there was misuse of authority: the Director and a senior colleague who was supervising him acted against the Organisation's interests from a spiteful urge to harm him by ouster.

Though the burden is on him to show such misuse of authority, he offers not a jot of evidence of it. He may have thought his performance beyond reproach; but, whatever the reports said on his performance, his supervisors kept within the broad bounds of their discretion in coming to the view that the change was needed for the sake of efficiency. Indeed the Director's own supervisor had approved it. The plea is without merit.

13. Since his main claim fails, so must the others. In argument since there was neither an unlawful decision nor any especially serious injury, the complainant is not entitled to moral damages.

## DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Michel Gentot, Vice-President, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 30 January 1997.

*(Signed)*

WILLIAM DOUGLAS MICHEL GENTOT EGLI

A.B. GARDNER

Organisation internationale du Travail
*Tribunal administratif*

International Labour Organization
*Administrative Tribunal*

***Registry's translation,***
***the French text alone***
***being authoritative.***

## EIGHTY-SECOND SESSION

***In re* Popineau (No. 13)** **Judgment 1591**

THE ADMINISTRATIVE TRIBUNAL,

Considering the thirteenth complaint filed by Mr Gérard Popineau against the European Patent Organisation (EPO) on 18 April 1996;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Article 7 of its Rules;

Having examined the written submissions;

### CONSIDERATIONS

1. This is Mr. Popineau's thirteenth complaint against his former employer, the European Patent Organisation. He wants the Tribunal to send the case back to the EPO so that the chairman of its Administrative Council may offer him an apology and he may be reinstated forthwith.

2. The background to the case was set out under 2 to 16 in Judgment 1363, which the Tribunal delivered on 13 July 1994 on his sixth, seventh and eighth complaints. By a decision of 2 September 1992 the EPO dismissed him for disciplinary reasons at 1 February 1993. He lodged those three complaints in August 1993 asking for the quashing of his termination and for reinstatement. The Tribunal dismissed them in Judgment 1363.

3. In Judgment 1540 of 11 July 1996 the Tribunal dismissed his ninth complaint on the grounds that any issue ruled on in Judgment 1363 was *res judicata*. So the rejection of his claims to the quashing of his dismissal and to his reinstatement was no longer challengeable but binding on both parties alike. That would cease to hold good only in the quite exceptional case where the Tribunal allowed an application by the complainant for the review of Judgment 1363.

4. He has made no such application. So it is futile for him to try to get the Tribunal to reverse its dismissal of his claim to reinstatement by

filing a new complaint against the rejection he infers from the Administrative Council's silence.

5. Nor may the Tribunal order the chairman of the Council to offer him an apology. The Tribunal is not competent to issue an order of that kind to the authorities of an international organisation.

6. Since the complaint is "clearly irreceivable" it must be summarily dismissed under Article 7 of the Rules.

## DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Michel Gentot, Vice-President, and Mr. Edilbert Razafindralambo, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 30 January 1997.

*(Signed)*

WILLIAM DOUGLAS MICHEL GENTOT E. RAZAFINDRALAMBO

A.B. GARDNER

***Registry's translation,***
***the French text alone***
***being authoritative.***

## EIGHTY-SECOND SESSION

**_In re_ Popineau (No. 14),**
**(Application for review)**

**Judgment 1592**

THE ADMINISTRATIVE TRIBUNAL,

Considering the fourteenth complaint filed by Mr. Gérard Popineau against the European Patent Organisation (EPO) on 13 October 1996;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Article 7 of its Rules;

Having examined the written submissions;

## CONSIDERATIONS

1. In this complaint, his fourteenth, Mr. Popineau is applying to the Tribunal for the review of Judgment 1540 of 11 July 1996 and asking it to allow his ninth complaint against the EPO. In that complaint he asked the Tribunal to send his case back to the Organisation so that he might reply to an article that had appeared in its *Gazette* and to award him material and moral damages and costs.

2. The Tribunal rejected his ninth complaint in Judgment 1540 for the reasons it had stated in Judgment 1363. It ruled that the passages in the article that he found libellous merely reflected the content of 1363 and reported the Tribunal's findings on the evidence entered by both parties. It concluded that, being *res judicata*, those findings were "no longer challengeable" but "binding on both parties as true statements of fact". Any issue ruled on in Judgment 1540 is again *res judicata*. As that judgment said, the only challenge that the Tribunal will allow, by way of exception, is an application for review based on some admissible plea.

3. Some of the complainant's pleas in this application are about Judgment 1363, not 1540. Since he is seeking review of 1540 they are irreceivable.

4. He objects to the reference in 1540 to "evidence entered by both parties" and alleges that there was no evidence to suggest that a firm

known as "Gérard Popineau Consultants" appeared in the business register in France. He thereby reveals misunderstanding of the *ratio* of 1540, which does not depend on any such entry in the register. So the complainant's argument is that the Organisation is unable to produce a "crucial" piece of evidence that would prove the existence of such entry is utterly irrelevant.

5. He pleads "grave breaches" of due process in his ninth complaint. But the only one he cites is the rejection of his application for hearings. As the Tribunal has said time and again — for example in Judgment 442 (*in re* de Villegas No. 4) — failure to hear evidence is not an admissible plea for review. So his plea fails.

6. Being "clearly irreceivable", the complainant's application for review must be summarily dismissed under Article 7 of the Rules.

## DECISION

For the above reasons,

The application is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Michel Gentot, Vice-President, and Mr. Edilbert Razafindralambo, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 30 January 1997.

*(Signed)*

WILLIAM DOUGLAS MICHEL GENTOT E. RAZAFINDRALAMBO

A.B. GARDNER

# EIGHTY-SECOND SESSION

***In re* Perez-Venero (No. 2)**
**(Application for review)**

**Judgment 1593**

THE ADMINISTRATIVE TRIBUNAL,

Considering the application for review of Judgment 1448 filed by Mr. Alejandro Perez-Venero on 7 July 1996;

Considering Articles II, paragraph 5, and VII, paragraphs 1 and 3, of the Statute of the Tribunal and Article 7 of its Rules;

Having examined the written submissions;

## CONSIDERATIONS

1. This is an application for the review of Judgment 1448, which dismissed Mr. Perez-Venero's complaint of 29 March 1994 against his former employer, the United Nations Industrial Development Organization (UNIDO). In that complaint he alleged that UNIDO had wrongfully separated him from service and he identified what he saw as two unlawful decisions: first, what he termed "notice of dismissal" in a memorandum dated 4 October 1993, which in a memorandum of 1 November 1993 he had asked the Director-General to review; secondly, an "agreed termination" dated 10 November 1993. The Tribunal held that under Article VII(1) of its Statute the complaint was for two reasons irreceivable: (1) the memorandum dated 4 October 1993 did not constitute notice of dismissal but was intended only to initiate discussion, and at that time there was no actual decision to terminate; and (2) though the decision to terminate had been notified to him on 10 November 1993 he had failed to take any action to initiate, let alone exhaust, his internal remedies.

2. The complainant is seeking review on the grounds that the Tribunal erred in dealing with his case under Article VII(1) of its Statute. He contends that his memorandum of 1 November 1993 was notification of a claim by him to a decision by the Director-General — "no matter the nature of that decision" — and that he was entitled to have direct recourse

to the Tribunal under VII(3) because the Administration had failed to take a decision upon that claim within sixty days of the notification thereof.

3. What he is pleading is a mistake of law in failing to deal with his case under Article VII(3). As the Tribunal has declared in Judgment 442 (*in re* de Villegas No. 4) and in many other judgments the plea of mistake of law does not afford admissible grounds for review. It therefore fails.

4. Besides, even assuming that the complainant's memorandum of 1 November 1993 was, as he now alleges, a "claim to a decision", the substance of that claim was that the UNIDO should not terminate his appointment. Although the letter of 10 November 1993 embodying the "agreed termination" made no reference to that claim, it was a decision on the subject of that claim. Thus it would have been mistaken to say that the Administration failed to take a decision within sixty days: Article VII(3) was inapplicable.

5. Being clearly irreceivable, the application must be summarily dismissed in accordance with Article 7 of the Tribunal's Rules.

## DECISION

For the above reasons,

The application is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 30 January 1997.

Wm Douglas

WILLIAM DOUGLAS

Mella Carroll

MELLA CARROLL

MARK FERNANDO

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

A.B. Gardner

A.B. GARDNER

Organisation internationale du Travail
*Tribunal administratif*

International Labour Organization
*Administrative Tribunal*

***Registry's translation,***
***the French text alone***
***being authoritative.***

# EIGHTY-SECOND SESSION

## *In re* Elotu

## Judgment 1594

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Joseph Elotu against the International Telecommunication Union (ITU) on 20 June 1996, the ITU's reply of 24 July, the complainant's rejoinder of 29 August and the Union's surrejoinder of 1 October 1996;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a Ugandan born in 1942, joined the staff of the ITU in 1978 under a fixed-term appointment as a telecommunication administrator at grade P.4 in the Technical Cooperation Department. In 1985 the Union transferred him to a post at the same grade in its External Relations Department and in 1989 it gave him a permanent appointment.

On 1 January 1992 it assigned him to its Telecommunication Development Bureau. In a memorandum of 30 January 1992 he asked its Secretary-General to upgrade his post in the Bureau. On 14 July 1995 the ITU did so and promoted him as from 1 June 1995 to grade P.5 as the Bureau's "coordinator for least developed countries' and international organizations' matters".

In a memorandum of 28 August 1995 he asked the Secretary-General to reconsider the decision of 14 July so as to promote him as from 1 November 1994. Having got no reply he went to the Appeal Board on 13 November 1995. In its report of 13 March 1996 the Board recommended backdating his promotion to 1 November 1994 but refusing him payment of a special post allowance from 1 March 1993 to 31 October 1994.

In a memorandum dated 23 April 1996 the Secretary-General told him of the rejection of the recommendation about the date of his promotion. That is the decision he is impugning.

B. The complainant submits that his promotion should be backdated on account of undue administrative delay. He says that the Union's failure to upgrade his post any sooner was "probably" discriminatory. Whereas it reclassified other posts in under six months, it left him with a "temporary" job description for some eight years during which his responsibilities went on growing.

He seeks the quashing of the impugned decision, promotion to P.5 as from 1 November 1994, the grant of a special post allowance from 1 March 1993 to 31 October 1994 and "castigation" of the Union for mishandling his case.

C. In its reply the ITU contends that it abided by all the rules on reclassification. The upgrading of his post turned on the broad issues of policy that arose from the establishment of a new unit and its effect on the structure of the Bureau as a whole. So things took time.

In any event the Union had no valid reason to backdate the complainant's promotion. As for the grant of a special post allowance, he met none of the conditions laid down in the Staff Regulations.

D. In his rejoinder the complainant rebuts the arguments in the ITU's reply and enlarges on his pleas. He points out that in breach of the material rules some have been getting special post allowances for over six years. Having performed the same duties since March 1993, he too was entitled to such an allowance. He adds a claim to costs.

E. In its surrejoinder the Union says that the complainant's arguments are a subjective interpretation of facts that is unsupported by any evidence.

## CONSIDERATIONS

1. The complainant is on the staff of the International Telecommunication Union (ITU), which on 1 January 1992 assigned him to its Telecommunication Development Bureau. He at once set about getting a more explicit description and an upgrading of his post, his promotion from grade P.4 to P.5, and payment of a special post allowance. Not until 20 June 1995 did the competent body, the Coordination Committee, approve a proposal from the Chief of Personnel to upgrade his

post to P.5. On 6 July 1995 the Committee approved his promotion with effect from 1 June 1995. On 14 July the Chief of Personnel wrote to tell him of the decision by the Secretary-General of the Union to promote him, and he had notice of that decision on 17 July. Objecting to the delay in taking the decision, he asked the Secretary-General to give effect to it as from 1 November 1994 instead. He got no answer, inferred rejection and went to the Appeal Board. The Board found no breach of procedure but because of the long delay recommended backdating his promotion to 1 November 1994. It did not recommend granting him the special post allowance. By a decision dated 23 April 1996 the Secretary-General rejected the Board's recommendation for backdating of the promotion to 1 November 1994 and confirmed the backdating of it to 1 June 1995.

2. The complaint is receivable. The complainant asks the Tribunal to order that his promotion date as from 1 November 1994, that he be paid the special post allowance from 1 March 1993 to 31 October 1994 and that the Union be "castigated" for keeping him for years on duties that were not covered by a proper post description. He claims costs.

3. As the Appeal Board observed, correspondence between the Union and the complainant about the description and grading of his post dragged on for three-and-a-half years, and that was too long. As the Board held, "the Administration has a duty to process promptly any claim to upgrading or to payment of special post allowance so that the official will not be left to suffer or to wonder what is going on".

4. Yet, understandably enough, the Union had difficulty in determining the content of the complainant's post and the new structure of the Bureau. His duties had changed, especially in March 1993, and it was reasonable for the Secretary-General to put off his final decision until he knew just what sort of unit the Union was to set up to serve the least developed countries and how the complainant would fit into it. Only in October 1994 did the Plenipotentiary Conference of the Union give the Secretary-General explicit instructions "within existing resources, to provide the necessary administrative and operational structure for proper administration of the resources appropriated for the Least Developed Countries". The procedure for grading the post could then go ahead, and the upshot was the submission of a report of 7 June 1995 by the Chief of Personnel.

5. Regrettably slow though the process may have been, the Union's assessment of the complainant's duties and qualifications was not the cause.

Nor does he adduce evidence to suggest any breach of the rules on grading and promotion. Soon after getting the report the Coordination Committee endorsed the proposal in it for upgrading his post and promoting him to P.5. The Administration was under no duty to backdate any of its decisions and its doing so in one case in 1992 conferred no right on the complainant. So there are no grounds in law for allowing his claim to promotion as from 1 November 1994.

6. His claim to the payment of special post allowance cannot succeed either. Under Staff Regulation 3.8 such allowance is payable to someone who is "temporarily required to assume the responsibilities and duties of an existing post in a higher grade" or has to do "additional temporary work of at least four weeks' duration". There is no evidence to suggest that the complainant met either of those conditions.

7. The conclusion is that the Union committed no unlawful act; that the delay was due to difficulties that unavoidably arose in reforming the Bureau; and that the complainant's claims must fail in their entirety.

## DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Michel Gentot, Vice-President, and Mr. Edilbert Razafindralambo, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 30 January 1997.

*(Signed)*

WILLIAM DOUGLAS MICHEL GENTOT E. RAZAFINDRALAMBO

A.B. GARDNER

Organisation internationale du Travail
*Tribunal administratif*

International Labour Organization
*Administrative Tribunal*

*Registry's translation,*
*the French text alone*
*being authoritative.*

## EIGHTY-SECOND SESSION

***In re* De Riemaeker (No. 3)** **Judgment 1595**

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Mrs. Irène Eugénia Luppens, née De Riemaeker, against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 22 May 1995, Eurocontrol's reply of 21 September 1995, the complainant's rejoinder of 1 January 1996, the Organisation's surrejoinder of 26 April, Mr. Alexander Rutherford's observations of 5 July, the complainant's comments thereon of 24 August and the Agency's final submissions of 30 September 1996;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a Belgian born in 1946, joined the staff of Eurocontrol on 2 January 1969. She was employed at the material time as a reviser at grade LA4 in the Translation and Interpretation Division (GS.3) at the Agency's headquarters in Brussels.

On 1 July 1992 she became deputy head of the division. On 31 March 1994 the head of division retired and his post, graded LA3, fell vacant. On 5 May the Director of Personnel told the complainant that the Director General had decided to appoint her as acting head as from 1 April 1994.

On 10 June 1994 the Agency issued a "vacancy notice/notice of competition", No. HQ-94-LA/080, for the post of head of the division. On 6 July the complainant applied. So did Mr. Alexander Rutherford, a reviser at grade LA4 who was head of the English translation unit. On 21 October a selection board was set up under Article 30 of the Staff Regulations. On 25 October the board declared both the complainant and Mr. Rutherford suitable for the post. By a letter of 2 November a personnel officer invited the complainant for a "further interview" on 22 November by private consultants on recruitment. He invited Mr. Rutherford too.

On 12 December a body which Eurocontrol calls an "ad hoc promotion board" and the complainant a "second selection board" recommended Mr. Rutherford. The Director General saw the complainant on 20 December 1994 and told her that he had decided to put Mr. Rutherford on the post. By a decision of 13 January 1995 the Director of Personnel, acting on the Director General's behalf, relieved her of her duties as acting head of the division and in a letter dated 26 January told her that she had not been appointed.

On 1 February she submitted a "complaint" to the Director General under Article 92(2) of the Staff Regulations against the decision of 13 January and asked him to make her the head of the division. By a memorandum of 3 March, which she impugns, the Director of Personnel announced that her "complaint" had been rejected.

On 29 March the Director of Personnel informed her of the Director General's decision to appoint her chief interpreter as from 1 April 1995.

B. The complainant has four pleas.

The first is that Eurocontrol offended against the rules on filling vacancies. The Director General took no account of the preference the selection board had expressed by putting her name above Mr. Rutherford's on its short list of 25 October 1994. Although Article 30(2) of the Staff Regulations empowers the Director General to reject a recommendation by the board he must state his reasons for doing so. Eurocontrol obliged both her and Mr. Rutherford to undergo "psychological tests" for which there was no provision in Article 30, the purpose being to override the board's recommendation. When the tests failed to yield the desired result Eurocontrol convened a second selection board in breach of the requirement in Article 30 that a single board consider the candidates.

Secondly, she pleads mistakes of law and of fact in acting on the vacancy notice, which required extensive experience of translation, revision, interpretation and supervision of a team of linguists doing such work. Mr. Rutherford had neither training nor experience in interpretation, whereas she is a trained interpreter and had worked as a translator and interpreter since 1971 and as a reviser since 1973.

Her third plea is that the decisions of 13 January and 3 March 1995 are unexplained and that the decision of 26 January did not give the real reasons for appointing Mr. Rutherford.

Lastly, she pleads misuse of authority. It had, she says, been decided long before that Mr. Rutherford should become the head of the division. That is why Eurocontrol held up the vacancy notice until 10 June 1994 when it knew full well that the former head was to retire at 31 March 1994: Mr. Rutherford could not apply until 1 July 1994 since not until then did he meet the requirement of two years' service at LA4.

The complainant asks the Tribunal to (1) order Eurocontrol to produce "all the material evidence", (2) hold hearings, (3) set aside Mr. Rutherford's appointment as the head of GS.3, the decision of 13 January 1995 relieving her as acting head and the one of 26 January 1995 rejecting her application, (4) reinstate her in her former duties and (5) confirm her appointment as the head of the division.

C. In its reply Eurocontrol contends that the complainant's claim to the quashing of the decision of 26 January 1995 is irreceivable because she has failed to exhaust her internal remedies and that claims (4) and (5), which would entail giving the Agency instructions, are irreceivable because the Tribunal may not do so.

On the merits it says that it complied with the material rules, including the ones on promotion. The selection board that met on 21 October never intended to put the applicants in order of merit: it declared them *ex aequo* and put them in alphabetical order on its short list of 25 October. Since the board's choice fell on Mr. Rutherford there was no need to explain the appointment. The "psychological tests" the complainant refers to amounted to "personal development evaluation" and were in line with the notice. Eurocontrol convened the selection board only once: it was the promotion board that recommended Mr. Rutherford for the post on 12 December 1994 and promotion requires prior consultation of that body.

The selection board made no mistake of law or of fact in declaring both applicants suitable. Since the post was for a head of division the board had discretion as to some of the requirements of the notice. It took the view that Mr. Rutherford's many years of service qualified him for the post. Besides, neither of the applicants met all the requirements stated in the notice, and insisting on them would have meant rejecting both in favour of some outsider.

The defendant says that it did state the reasons for the decision of 13 January 1995. Though the complainant failed to exhaust the internal procedure for challenging the decision of 26 January, the Agency gave such explanation for it as precedent requires.

Misuse of authority may not be presumed and the complainant offers no evidence of it.

The Agency claims an award of costs against her.

D. In her rejoinder the complainant challenges Eurocontrol's objections to receivability and enlarges on her pleas on the merits. Since the Administration chose to put the post up for competition and allow outside applicants the body competent to make a final assessment of the candidates was the selection board, not an "ad hoc promotion board".

She claims costs.

E. In its surrejoinder the Agency restates its pleas on receivability and on the merits. It maintains that the selection board rated the two applicants *ex aequo*. Since both were at a grade lower than that of the vacancy each was seeking promotion. So the complainant may not properly object to the setting up of the ad hoc promotion board.

F. In observations invited by the Tribunal Mr. Rutherford demurs at disclosure of the findings of the "personal development evaluation" on the grounds that the private and confidential information they contain was intended for only a few senior officers. He applied for the post because he was a university graduate who had experience of work at the Agency and training in management. Though not an interpreter, he says that the head of a language service has no time for actual translation, revision or interpretation, which he must delegate so as to be free for administrative work.

G. In her comments on Mr. Rutherford's observations the complainant says that the Agency "dissembled" by alleging that its preference rested on the findings of the "psychological tests". By concealing the reasons for the appointment it has made an improper use of its discretionary authority and acknowledged its failure to act in the interests of the service. The notice of vacancy precluded appointing someone who was not an interpreter. Only a trained interpreter can head a team of interpreters.

H. In a final brief Eurocontrol denies that only a trained interpreter may head the division. More countries having joined the Organisation, the work of the division has so grown that the head of it must spend all his time managing and planning and leave translation and interpretation to others. That is why both the selection board and the promotion board chose Mr. Rutherford and why the Director General appointed him.

## CONSIDERATIONS

1. The complainant, who is at present chief interpreter at Eurocontrol, is impugning the Director General's decision to appoint Mr. Alexander Rutherford head of the Translation and Interpretation Division (GS.3) as from 1 January 1995 and to reject her own application for the post. She is also challenging a decision of 13 January 1995 to relieve her of the duties of acting head which she had had since 1 April 1994. She seeks reinstatement in those duties and permanent appointment as head of the division.

2. Eurocontrol pleads that the complaint is irreceivable on two counts. One is that her challenge to the decision of 26 January 1995 rejecting her application was never put to the Director General and is therefore new. The other objection is that her claims to reinstatement in her former duties and to permanent appointment to the post are not of a kind that the Tribunal may entertain since it may not interfere in the Director General's exercise of his discretion.

3. The Agency's first plea is mistaken. The complainant's "complaint" of 1 February 1995, which the Director General rejected on 3 March 1995 — the impugned decision — sought the reversal of the decision of 13 January 1995 relieving her of duties on the grounds that "Mr. Alexander Rutherford is appointed head of division GS.3 as from 1 January 1995". She objected to the process of selection and asked the Director General to appoint her instead. Even if she had not expressly asked him to reverse the decision of 26 January 1995 rejecting her application — which she seems to have got only after lodging her appeal — her present claims fall within the ambit of that appeal and her complaint puts forward none that is new.

4. The Agency's other plea is, however, sound. Whether or not the Tribunal quashes the impugned decision it may not replace the Organisation's assessment of the applicants with its own and order any particular appointment. So the complaint is irreceivable insofar as the complainant is claiming reinstatement in her former duties and permanent appointment to the post.

5. She has four main pleas on the merits. Her first is that the process of selection was in breach of Article 30 of the Staff Regulations and the implementing rule, No. 2. Secondly, she accuses Eurocontrol of departing from the terms of the notice and committing mistakes of law and of fact in appointing someone who did not meet the stated requirements and in rejecting herself, who did. Thirdly, she contends that the impugned decision was unexplained and so in breach of Article 25(2) of the Staff Regulations. Lastly,

in her submission the Director General exercised his discretion for a purpose extraneous to the Agency's interests, gave in to influence of a kind he may not openly acknowledge, and thereby misused his authority.

6. Since the second plea — failure to observe the terms of the notice — is upheld there is no need to entertain the other three.

7. The vacancy notice/notice of competition, No. HQ-94-LA/080 of 10 June 1994, announced the vacancy and set out the qualifications required for head of the Translation and Interpretation Division. Besides "general" requirements that are not at issue the notice stated the following "special" ones:

> "long experience (at least 10 years) of translation, revision and interpretation; experience as head of a team of translators, revisers and interpreters; perfect grasp of the problems of managing a multilingual translation service; thorough proficiency in at least two official languages of the Agency, one of them being English or French, including both technical and legal terminology; proficiency in at least two other official languages; the ability to write and to speak clearly, accurately and concisely; and the ability to ensure smooth working relations."

8. The complainant says that she herself met those requirements but the successful applicant did not. Translation and interpretation are, in her view, quite different things and the head of the division must be proficient in both. Indeed, she argues, that is why the notice required long experience, of at least ten years, of translation and interpretation alike and experience in managing a team of translators and interpreters. Mr. Rutherford has never been an interpreter and has no experience of interpretation.

9. The Agency's answer is that, though not himself an interpreter, Mr. Rutherford knows enough about interpretation to run a language service and has skills in management that the complainant lacks; an applicant did not have to meet all the requirements set out in the notice; so it was a quite proper exercise of discretion to lend more weight to some of them than to others, especially since no one candidate, and certainly not the complainant, had all of them.

10. That line of argument, though not without merit, does not pass muster. For one thing, even if she were unqualified for the post the complainant would not forfeit her right to challenge the appointment. For another, though the qualifications stated in a notice of vacancy are not absolutely binding and the Director General may still exercise some discretion, he may not so utterly discard them as to flout the rules that ensure the proper openness and objectivity of the competition. Here the qualifications that Eurocontrol set out were fully warranted by its desire to get someone with experience of both translation and interpretation to head the service. Having

itself laid down those essential qualifications, the Agency had a duty to abide by them. Yet it plainly failed to do so since, as it admits, Mr. Rutherford had never worked as an interpreter, though he had spent "22 years in the English language section of Division GS.3", and so had no experience at all of interpretation, let alone the "long" experience the notice had called for. And his having had one interpreter as a subordinate obviously did not amount to experience in heading a team of translators and interpreters.

11. There is no need for the disclosure of evidence and the hearings that the complainant asks for. The Tribunal is satisfied on the evidence before it that the Agency failed to abide by the terms of the notice that had prompted the complainant to apply for the post and that Mr. Rutherford's appointment as the head of the Translation and Interpretation Division therefore cannot stand. For the reasons set out in 4 above, however, the complainant's claims to reinstatement in the duties of acting head and to permanent appointment to the post must fail.

12. She is awarded 100,000 Belgian francs in costs. So the defendant's claim to an award of costs against the complainant fails.

## DECISION

For the above reasons,

1. The Director General's decision of 3 March 1995 is set aside insofar as it rejects the complainant's claim to reversal of the decision appointing Mr. Alexander Rutherford as the head of the Translation and Interpretation Division.
2. The procedure for appointment to the post is cancelled and the case sent back to Eurocontrol so that it may make an appointment to the post by due process.
3. Eurocontrol shall pay the complainant 100,000 Belgian francs in costs.
4. Her other claims are dismissed.

**In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Michel Gentot, Vice-President, and Mr. Edilbert Razafindralambo, Judge, sign below, as do I, Allan Gardner, Registrar.**

**Delivered in public in Geneva on 30 January 1997.**

***(Signed)***

**WILLIAM DOUGLAS** **MICHEL GENTOT** **E. RAZAFINDRALAMBO**

**A.B. GARDNER**

## EIGHTY-SECOND SESSION

**_In re_ Leicht, Linsbauer, Raade, Samuelsson, Sherwood and Watkinson** **Judgment 1596**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Miss Elsbeth Leicht, Mr. Günter Linsbauer, Mrs. Erna Maarit Raade, Mrs. Berit Marianne Samuelsson, Mrs. Lesley Ann Sherwood and Mrs. Nita Katherine Sylvia Watkinson against the European Free Trade Association (EFTA) on 7 February 1996, EFTA's reply of 20 May, the complainants' single rejoinder of 13 July, the Association's surrejoinder of 18 October, the complainants further submissions of 30 October and the Association's comments thereon of 11 November 1996;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which none of the parties has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. EFTA employed the complainants, who are Swiss, for periods ranging from five years and ten days to nine years and five months. It abolished Mrs. Watkinson's post on 30 April and those of the other complainants on 30 June 1995. It extended their appointments by various periods ranging from one to seven months under "fixed-term" contracts that expired at the dates of abolition. The letters of appointent said that the rules "do not provide for a termination indemnity if a fixed-term appointment expires without being renewed".

The Association informed Mrs. Watkinson by a letter of 28 September 1994 and the other complainants by letters of 14 December 1994 of decisions not to renew their appointments further.

In letters of June 1995 to the secretary of the Advisory Board the complainants claimed payment of the termination indemnity. By letters of 14 November 1995 the Secretary-General told them that on 20 July 1995 the

"Supervisory Body of the Seven current and former EFTA States" had decided to pay the indemnity to anyone with over ten years' service but had failed to agree whether to pay it to anyone else. Those are the challenged decisions.

B. The complainants submit that EFTA owes them the indemnity. In their view it had no "objective" basis for the ten-year requirement and acted in breach of the principle of equal treatment. It granted the indemnity to staff with less than ten years' seniority when the dates of abolition and expiry did not coincide. By offering the complainants "fixed-term" contracts of only a few months instead of the two to five years prescribed in Staff Regulation 10(a)(i) it sought to bring into play Regulation 12.5(b), which relieved it of paying compensation to anyone "whose fixed-term contract expires without being renewed". The Tribunal has already outlawed such practice.

They each claim the indemnity: 5 months' pay for Miss Leicht, 8 for Mr. Linsbauer, 7 for Mrs. Raade, 6 for Mrs. Sherwood and Mrs. Watkinson and 4 for Mrs. Samuelsson. They seek costs.

C. In its reply EFTA argues that the complaints are irreceivable. The decisions they are purportedly impugning are not challengeable. What each is objecting to is either the letter of appointment or the letter sent in September or December 1994 confirming non-renewal: whichever it be, they have all acted out of time.

Their complaints are in any event devoid of merit. There was nothing wrong with offering them shorter contracts and, having accepted, they are estopped from challenging an express provision in their letters of appointment. There was no breach of equal treatment: others whose posts were abolished before the expiry of appointment or who got payments *ex gratia* for over ten years' service were not in like case.

D. In their rejoinder the complainants adduce further factual evidence and answer the Association's arguments.

E. In its surrejoinder EFTA presses its case and raises procedural objections to documents produced in the rejoinder.

F. In further submissions which the Tribunal gave the complainants leave to enter they challenge the contention in the surrejoinder that their counsel failed to answer a letter that the Association had sent on 18 September 1996: the answer was in a letter of 8 October.

G. Invited to comment, the Association says it can find no trace of that letter.

## CONSIDERATIONS

1. Each of the six complainants, who used to be on the staff of EFTA, is claiming payment of a termination indemnity under the Staff Rules and Regulations.

2. In 1989 the seven member countries of EFTA began the complex negotiations with the European Union which, though their outcome was uncertain, eventually led to adoption of the European Economic Area Agreement. At a meeting on 22 June 1994 in Helsinki the ministers of the member countries noted that Austria, Finland, Norway and Sweden would on 24 June be signing the Treaty of Accession to the Union and would be leaving the Association at the end of the year to join it. The ministers' meeting confirmed the decision to keep the secretariat in full operation until the end of the year but agreed that the secretariat would have to survive for up to six months after that date, though adjusted to the needs of the remaining Members.

3. At a meeting on 12 December 1994 the Council of EFTA, still comprising the seven member States, set up a body to supervise the winding up of the Association and any operations to be carried out under its final budget in the period from January to June 1995. One decision that the Supervisory Body took was to authorise the *ex gratia* payment of termination indemnities to staff members who had completed at least ten years' service.

4. From March 1993 the Association extended the contracts of its staff by only one year at a time. In March 1994 its Council agreed that contracts might be renewed to 30 June 1995, and in June 1994 that renewal would not be automatic but subject to continuing assessment of needs. Before the Council approved the policy of having as many fixed-term contracts as possible end at 30 June 1995 some staff members had received normal renewals of contract and so that for them the date of termination was after 30 June 1995. They were paid the termination indemnity even though some had completed fewer years' service than the complainants.

5. The complainants were in the following position.

(i) The last notice of renewal that Miss Leicht got was dated 30 June 1994 and told her that her contract was extended by six months from 1 January to 30 June 1995. By the end of June 1995 she had served a total of six years and six months and was at step 8 in grade G.7.

(ii) Mr. Linsbauer got his last notice of renewal in a text dated 28 September 1994: the extension was for the three months up to

30 June 1995. By then he was at G.4, step 11, and had served for nine years and five months.

(iii) In her last notice of renewal, dated 2 June 1994, Mrs. Raade was granted a seven-month extension up to 30 June 1995. She left at grade G.6, step 8, and had served for eight years and seven months.

(iv) The last notice of renewal that went to Mrs. Samuelsson was dated 30 June 1994. She got an extension of contract for six months expiring on 30 June 1995. She was at grade G.5, step 7, and her period of service came to five years and twenty-one days.

(v) For Mrs. Sherwood the last notice of renewal was given on 25 November 1994: she got one month's extension expiring on 30 June 1995. She left at grade P.3, step 6, and had served a total of seven years and one month.

(vi) Lastly, Mrs. Watkinson had her last notice of renewal on 21 July 1994, the contract being for three months up to 30 April 1995. When she left she was at grade G.5, step 11, and her seniority came to seven years, three months and fourteen days.

Mrs. Watkinson got notice of non-renewal by a letter of 27 September 1994; all the others got it by letters dated 14 December 1994.

### *Joinder*

6. The Association objects to the joinder of the six complaints on the grounds that there are material differences in fact between the complaints and that only the cases of Mrs. Raade and Mrs. Sherwood are joinable.

7. It explains that Miss Leicht was offered an appointment in the new secretariat after 30 June 1995 but withdrew her application for employment. But that is irrelevant to the material issue. Either she is entitled to the indemnity or she is not, whether or not she was employed after the date of termination.

8. As to Mrs. Samuelsson, the Association says that she held a temporary appointment on a post that was created for the purpose of the negotiations with the European Union. The records show, however, that after two temporary contracts she held fixed-term, not temporary, ones and that whereas the negotiations were over in 1992 her employment did not end until 30 June 1995. So there is no reason to treat her case separately.

9. EFTA points out that Mrs. Watkinson's contract, unlike those of the other complainants, expired on 30 April 1995. Yet she is in the same position as they in that her appointment expired and her post was abolished on the same

day: that is clear from the notice of non-renewal. So the same issues arise in her case even though the dates are different.

10. The defendant says that Mr. Linsbauer challenged — albeit five months after acceptance — the decision to grant him a "fixed-term" contract, whereas the others did not. Whether he did or not is irrelevant since his complaint is not about the duration of the contract but about his entitlement to the indemnity on its expiry. The Association also states that he sent the Secretary General a letter on 8 March 1995, and a copy of it to the Advisory Board, claiming termination indemnity under Staff Regulation 12.5. On 26 June 1995 he appealed directly to the Advisory Board and pointed out that in the absence of a reply from the Secretary-General he was entitled under Regulation 41(c) to lodge an appeal with the Tribunal. On 27 June he wrote again to the Advisory Board asking for a "considered opinion on his position". It is clear that he was seeking to exhaust the internal means of appeal. So the correspondence did not put him in a position different from that of the other complainants.

11. The conclusion is that there is no valid objection to joinder of all six complaints.

12. Regulation 10(a)(i) provides that fixed-term contracts are —

> "normally granted for two or three years and may in special cases be granted for a period not exceeding five years. Initial contracts for locally recruited staff are normally granted for one year ..."

Regulation 10(a)(iv) says that a contract for a fixed-term appointment may be renewed if it is in the Association's interest; 12.5(c) contains a schedule fixing the indemnity to be paid to a staff member whose fixed-term appointment is terminated; and 12.5(b) lists the cases in which no indemnity shall be due, one being where a "fixed-term contract expires without being renewed".

13. All of the complainants, who received renewals of appointment, had their attention drawn in their letters of appointment to the fact that the "Staff Regulations and Rules do not provide for a termination indemnity if a fixed-term appointment expires without being renewed". The fact that they all accepted renewal does not estop them from claiming the indemnity in accordance with the rules.

14. Mrs. Raade wrote to the Secretary-General on 10 May 1995 claiming payment of the indemnity and was informed on 22 May 1995 that a decision on payment to staff with less than 10 years' service was "still pending" but that the matter would "hopefully find a positive outcome" at the Supervisory Body's next meeting.

15. On dates ranging from 23 to 29 June 1995 the six complainants wrote to the secretary of the Advisory Board in accordance with Regulation 40(a) claiming the payment of the termination indemnity. In letters of 14 November 1995 the Secretary-General replied that for lack of agreement between the delegations of the seven former and present EFTA member countries the Advisory Board could not be constituted and that, the Board having failed to report within sixty days of the date of notification of the appeals, Regulation 41(b) allowed for direct appeal to the Tribunal.

16. By other letters, also dated 14 November 1995, the Secretary-General informed the complainants that the Supervisory Body had decided on 20 July 1995 to pay termination indemnities to staff with over 10 years' continuous service but that "consensus could not be found on payments of indemnities to staff members with less than ten years of service".

*Receivability*

17. The complainants lodged their complaints with the Tribunal, on 7 February 1996, before the expiry of ninety days from the date at which they had received the Secretary-General's letters of 14 November 1995.

18. The Association submits that the complaints are irreceivable on the grounds that for each complainant the challengeable decision by the Secretary-General was the one in the notice of non-renewal and that the refusal to pay the termination indemnity was merely a consequence of the final decision not to renew and entailed no further decision by the Secretary-General. So — argues EFTA — if the complainants wanted to claim the indemnity they should have appealed against the decisions not to renew their appointments.

19. That argument betrays misunderstanding of the complainants' case. In claiming the indemnity they were not seeking to impugn the decisions not to renew. What is at issue is not the renewal or length of their appointments but whether, notwithstanding the interpretation put on Regulation 12.5 by the Association, they were entitled to the indemnity on the expiry of the fixed terms stated in their contracts.

20. The complainants give "on or after 20 July 1995" as the date of the decisions impugned and 14 November 1995 as the date at which each had notice of a decision affecting a class of officials.

21. The other letters of 14 November 1995 admitted that the Administration had failed to set up an Advisory Board to deal with the appeals because delegations of the seven former and present member States had failed to agree on "the constitution" of the Board and appeal would therefore lie to the Tribunal. Article VII(3) of the Tribunal's Statute allows for such direct appeal

where the Administration has failed to take a decision within sixty days of the notification of the claim, the complaint to be filed within ninety days of the expiry of the sixty. Regulation 41(b)(ii) also allows for appeal to the Tribunal "where the Advisory Board has failed to transmit its opinion or proposals for settlement within sixty days of the receipt of the complaint".

22. It is true that by that reckoning the time limits for filing complaints with the Tribunal would have run out 150 days after the notification of the claims to the Advisory Board, at dates ranging from 20 to 26 November, or only a few days after the complainants got the letters of 14 November 1995 saying that there was no Advisory Board. In Judgment 607 (*in re* Verron), however, the Tribunal said under 8:

> "Proper administration requires the setting of time limits. But they are not supposed to be a trap or a means of catching out a staff member who acts in good faith."

Article 40(b) of the Staff Regulations provides that "prior to appealing to the ... Tribunal ... the staff member shall have submitted his case to the Advisory Board". Though the complainants were all told promptly that a new secretary had been named to the Advisory Board, not until mid-November did they hear that there was no such Board. It is questionable whether an appeal may be lodged with the Board by the mere writing of a letter to its secretary when the Board itself has never been constituted. The letters of 14 November 1995 informing the complainants that the Advisory Board would not be constituted made it plain that they would be unable to exhaust the internal means of appeal laid down in the Regulations and the time limit therefore started to run at the date of receipt of those letters. That is indeed what the Secretary-General indicated to them. So the conclusion is that they observed the time limit of ninety days in Article VII(1) of the Statute.

*The merits*

23. Regulation 12.2 reads:

> "(a) The Secretary-General may terminate the fixed-term appointment or permanent appointment or of a staff member:
>
> (i) due to the abolition of the post or if the staff of the Secretariat has to be reduced because of a reduction of its manning table;
>
> (ii) for disciplinary reasons in accordance with Regula-tion 33;
>
> (iii) if his services are unsatisfactory for other than disciplinary reasons.
>
> (b) If the necessities of the service require abolition of a post or reduction of the staff, and subject to the availability of suitable posts in which their services can be effectively utilized, staff members with permanent appointments shall be retained in preference to those with fixed-term appointments. Due regard shall be paid to the competence, integrity and

> length of service of the staff members concerned and the special circumstances presented by each individual case.
>
> (c) A written notice of termination shall be given which states the grounds and particulars thereof. Except if the contract states otherwise, the period of notice shall be in the case of a fixed-term appointment not less than three months and in the case of permanent appointment not less than six months.
>
> (d) In lieu of notice the Secretary-General may authorize payment of the staff member's total emoluments for the period of notice."

And Regulation 12.5(a):

> "A staff member whose appointment is terminated by the Association shall be paid a termination indemnity in accordance with the following provisions."

24. Regulation 12.5(c) provides that in case of termination of a fixed-term appointment the indemnity shall consist of a number of monthly payments of salary that starts at one for someone with one year's service and goes up to 12 for someone who has completed 13 years' service. According to 12.5(c) it makes no difference whether the terminated appointment was for one year or for five, and whether termination occurs at the end of the fixed-term appointment or earlier. The only criterion laid down in 12.5(c) for the reckoning of the indemnity is length of service, which according to Rule 12.5 "is deemed to comprise the total period of a staff member's full time continuous service with the Secretariat". The intent of the regulation is that the amount of the indemnity should depend not on the duration of the fixed-term appointment but on total length of service.

25. The Tribunal is satisfied on the evidence that the Association calculated the extensions of the complainants' appointments so as to make the dates of expiry and of abolition of their posts coincide and so avoid paying them the indemnities in accordance with Regulation 12.5(c). There must have been a need for Mrs. Watkinson's post up to 30 April 1995 and for the other complainants' posts up to 30 June 1995; otherwise they would not have had their appointments renewed to those dates. So the material issue is whether a termination indemnity is payable where the abolition of the post and the expiry of the fixed-term appointment have been deliberately made to coincide.

26. Commenting on the Staff Rules of the Pan American Health Organization (PAHO), the Tribunal held in Judgment 469 (*in re* O'Connell):

> "... it must not be assumed that the power of non-renewal under [Staff Rule] 1040 could properly be used to prolong an appointment for a period just long enough to survive the abolition of the post and with the sole object of avoiding payment of an indemnity under 1050."

Though the rules at issue in that case were different, the principle is clear and it is a sound one. Applying it to the present cases means that EFTA was not free to manipulate renewal so as to avoid the payment of the indemnity where, if the normal pattern had been followed, the indemnity would have been payable. EFTA must therefore pay the complainants termination indemnities to be reckoned according to length of service as provided in Regulation 12.5.

27. They are also entitled to costs, and the Tribunal sets the amount at a lump sum of 10,000 Swiss francs.

28. In its surrejoinder the Association takes the complainants to task for having produced three documents with their rejoinder of 13 July 1996. It claims privilege for one appendix to their submissions, which is the text of a legal opinion advising it to pay termination indemnities. A second appendix is, it says, a confidential memorandum of 7 February 1995 addressed to the delegations of its member States about that legal opinion and containing the recommendation of its secretariat to pay indemnities where total employment was more than six years. The third appendix that it sees as confidential is a memorandum dated 12 April 1995 to the delegations about the cost of the indemnities.

29. The Secretary-General wrote to each of the complainants on 23 July 1996 objecting to the production of those documents and asking them to surrender at once all EFTA documents in their possession, to explain how they had come by them and what use had been made of them, and to confirm that they would make no further use of them.

30. The complainants' counsel replied on 29 July 1996 disputing that the legal opinion was confidential on the grounds that EFTA had let the Staff Association have a copy; the complainants had refrained from producing confidential memoranda in their complaints, but once the defendant produced some of the minutes of the Supervisory Body's discussions there could be no objection to their submitting others.

31. The Association's counsel wrote on 18 September to counsel for the complainants saying that they had no right to have the documents, let alone produce them. In its surrejoinder the defendant says it got no answer. In a further brief the complainants' counsel says that she had replied on 8 October and she appends a copy of the letter. In comments on that brief the Association says it cannot find any trace of the reply but has no objection to putting it in the case records; it maintains its objections to the production of the three items.

32. A legal opinion obtained for the purpose of litigation will ordinarily be privileged. But the defendant does not deny having made the text of the legal opinion available to representatives of the Staff Committee. Having been given the text without any condition or rider, the Staff Association was entitled to make copies available to its members.

33. The two memoranda were before the Supervisory Body. EFTA having submitted to the Tribunal the minutes of some of the Supervisory Body's meetings, the complainants were entitled to disclose those memoranda. Besides, the Tribunal's decision does not turn on the contents of the documents.

## DECISION

For the above reasons:

1. The Association shall pay each of the complainants termination indemnity to be reckoned according to length of service.
2. It shall pay them a total lump sum of 10,000 Swiss francs in costs.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Michel Gentot, Vice-President, and Miss Mella Carroll, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 30 January 1997.

Wm Douglas

WILLIAM DOUGLAS

MICHEL GENTOT

Mella Carroll

MELLA CARROLL

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

A.B. Gardner

A.B. GARDNER

Organisation internationale du Travail
*Tribunal administratif*

International Labour Organization
*Administrative Tribunal*

***Registry's translation,***
***the French text alone***
***being authoritative.***

## EIGHTY-SECOND SESSION

***In re* Watson (No. 4)** **Judgment 1597**

THE ADMINISTRATIVE TRIBUNAL,

Considering the fourth complaint filed by Mr. Jeremy Watson against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 21 November 1995 and corrected on 4 March 1996, Eurocontrol's reply of 7 June and the Registrar's letter of 14 August 1996 informing complainant's counsel that, the time limit for filing a rejoinder having expired, the written pleadings had closed under Article 9(2) of the Rules of the Tribunal;

Considering Articles II, paragraph 5, and VII, paragraph 1, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a British subject born in 1939, joined the staff of Eurocontrol on 1 January 1965 under a permanent appointment. After serving at the Organisation's headquarters in Brussels and at its centres at Maastricht and Karlsruhe he was transferred on 1 June 1981 to its Institute of Air Navigation Services, which is in Luxembourg. At the material time he was employed as a principal expert at grade A4 in charge of the "Systems Bureau". The background to the dispute is set out under A in Judgment 1615 (*in re* Boland No. 9, Hardy No. 3, Heller No. 3 and others) also delivered this day.

By a letter of 28 March 1985 the Director of the Institute told the complainant that his post would not survive reforms but that an "assessment team" would be interviewing him to see whether there was another job for him at the Institute. On 6 April the team considered whether he was cut out for building coordinator and the very same day the Director told him of its conclusion that he was.

In talks with the Director on 12 May he said he was interested in a post graded A5 for head of Technical Support. In a report dated 17 May the team of assessors said that he was fit for it. On 18 May the Director told the complainant orally that he was recommending for that post someone who already held grade A5 but was backing him for building coordinator, though he had doubts whether the job would survive.

In a letter of 2 June to the Director General the complainant referred to a letter of 19 May he had got from the Director of Personnel and pointed to what he saw as flaws in the exercise of redeployment, namely (1) the loss of his post because of the reforms, (2) the assessment of him for the post as head of Technical Support and (3) the reasons stated for giving it to someone else.

By a notice dated 6 June and signed by the Director of Personnel the Director General transferred the complainant to the office of the Director of the Institute as from 1 July pending a decision on the duties he might be given elsewhere in the Agency. On 28 June he lodged a "complaint" against that transfer.

By a letter of 23 August 1995, which he is impugning, the Director of Human Resources answered on the Director General's behalf the objections in his letter of 2 June.

In a letter of 9 October the same Director told him he was formally "transferred" to headquarters as from 16 October 1995, though he was actually to stay on in Luxembourg, to do a study that would take from six to eight months.

B. The complainant submits that the procedure of redeployment was unlawful. Unlike reforms which were made at the Institute on 1 January 1993 and which led to Judgment 1358 (*in re* Cassaignau No. 3), this time the reforms entailed doing away with some jobs and creating others. So the Director General had a duty under Article 30 of the Staff Regulations to issue notices of all vacant or new posts, hold competitions and set up selection boards to rate applicants. The "assessment team" was no selection board. Some posts were filled straightaway without any procedure of assessment: that was in breach of equal treatment and counter to the interests of those who lost their posts in the reforms.

The Director General gave no explanation of his decisions not to have a building coordinator — despite the recommendation by the Director of the Institute — and to put someone else in charge of Technical Support. The complainant says that he was fully qualified to be head of Technical Support.

He charges the Agency with breach of his rightful expectations and of the principles of proper management. It rushed the redeployment through. The Director General acted in breach of his duty of care by transferring the complainant from Luxembourg in disregard of his individual rights. His son is seriously ill and needs expensive therapy and a life free from disturbance.

The Director General was guilty of misuse of authority by changing the grading of vacancies and the qualifications required for them so that he could either appoint someone picked in advance or else get rid of an official by transferring him to another duty station. The post of head of the Systems Bureau was not really dropped; the duties survived and were reallotted.

He seeks the quashing of the decision of 23 August 1995 rejecting his "complaint" of 2 June 1995 and an award of costs.

C. Eurocontrol replies that the complaint is irreceivable. First, the complainant's letter of 2 June 1995 was no internal appeal either in form or in substance. At the time the Agency had not taken a final decision on the complainant's status since redeployment was not yet over. What he calls an appeal did not make a single claim. Secondly, his sole purpose was to stay in Luxembourg: since he is still living and working there despite his formal "transfer" to Brussels, he has no cause of action.

In subsidiary argument on the merits the Agency submits that, as in 1993, when it reformed the Institute, it began the exercise of redeployment in 1995 by assigning duties within the new structure to the members of the staff while keeping them on the posts they held. That is how it came to transfer the complainant without any change of grade or budgetary post to the office of the Director of the Institute. Notwithstanding the terms of some of the papers about the exercise, there was no question in 1995 of filling any vacancies. So he is wrong to allege breach of Article 30 of the Staff Regulations.

The provisional transfer of the complainant to the Director's office was a proper exercise of the Agency's discretionary authority to determine its own structure.

The Director General took account of the complainant's rights and interests, including his son's illness. He may not rely on any rightful expectation in the absence of any promise from the Agency to keep him in Luxembourg or put him on one of the two posts he wanted.

The Director's purpose in recommending him for the new temporary post of building coordinator, even though he did not much care for it, was to let him stay on in Luxembourg. In any event the recommendation was not binding on the Director General. As for the appointment of someone else to head Technical Support, the Director gave the complainant the reasons when they met on 18 May 1995.

Lastly, there can be no presumption of misuse of authority, and the complainant has failed to show how any change in grading or duties caused him injury.

## CONSIDERATIONS

1. The complainant joined Eurocontrol on 1 January 1965 as an expert in category A. Since 1981 he has been stationed at its Institute of Air Navigation Services in Luxembourg. At the material time he was employed there as a principal expert at grade A4 and was in charge of the "Systems Bureau".

2. There have been several bouts of reform at the Institute, the latest approved by the Committee of Management of Eurocontrol in March 1994. The staff had notice in September 1994 of the Committee's decision and the reforms went ahead in 1995.

3. By a letter of 28 March 1995 the Director of the Institute told the complainant that his job would not survive them but an assessment team would be interviewing him to see what he could do at the Institute. After looking into his qualifications and skills the team recommended him for building coordinator. On 12 May he saw the Director and said he was interested in taking charge of Technical Support. On 18 May, however, the Director told him that someone else was to head Technical Support and that there was to be no building coordinator.

4. On 2 June 1995, in answer to a letter of 19 May from the Director of the Institute, he sent the Director General a letter objecting to the decisions he had learned of from the letter of 28 March, to the assessment of him by the team and to the appointment of someone else to head Technical Support. On 6 June the Director General decided to transfer him and thirteen others provisionally to the office of the Director of the Institute.

5. On 28 June he lodged a "complaint" against that transfer. In a letter of 23 August the Director of Human Resources rebutted on the Director General's behalf the objections in his letter of 2 June. That is the "decision" he purports to be impugning.

6. By a decision of 27 October 1995 the Director General rejected his "complaint" of 28 June 1995 and forwarded to him a copy of a report dated 26 July 1995 by the Joint Committee for Disputes.

7. Eurocontrol pleads that the complaint is irreceivable on the ground, among others, that the impugned decision causes the complainant no injury.

Its case is that his letter of 2 June 1995, to which the impugned "decision" of 23 August 1995 replied, was no internal appeal either in form or in substance and that not until 28 June 1995 did he lodge one. That appeal went through the prescribed procedure and was rejected by the decision of 27 October 1995, which the complainant has impugned in his fifth complaint, filed on 24 January 1996.

8. Articles 92(1) and (2) of the Staff Regulations set out the procedure of appeal. According to 92(1) anyone to whom the Regulations apply may submit to the Director General a "request" for him to take a decision. If no decision comes in four months rejection is implied. Under 92(2) the staff member may submit to the Director General a "complaint" against an act adversely affecting him, whether the Director General has taken a decision or not. The staff member must submit such "complaint" within three months of the "publication of the act" or the expiry of the time limit for reply to the "request". According to paragraph 4 of the appendix to office notice 6/95 of 1 March 1995 the Director General must consult the Joint Committee for Disputes before rejecting a 92(2) "complaint" in whole or even in part.

9. The decision challengeable before the Tribunal under Article VII(1) of its Statute is the reply that the Director General makes to a "complaint" submitted in accordance with 92(1) and (2) after he has consulted the Joint Committee for Disputes: only when there is such a reply will the complainant have exhausted his internal remedies.

10. The complainant's letter of 2 June 1995 to the Director General did not amount to a "complaint" under 92(2) inasmuch as it was a reply to a letter dated 19 May 1995 from the Director of Personnel, not a challenge to a decision from the Director General. Indeed the terms of his letter to the Director General show that he sent it "in order to assist you in your final decision".

11. Even supposing that the Director General's reply of 23 August 1995 may be treated as the act adversely affecting the complainant, he ought to have lodged a 92(2) "complaint" against it. Before taking his decisiòn thereon the Director General was required, under the new internal procedure, to put the case to the Joint Committee for Disputes. Since the complainant has come straight to the Tribunal to appeal against the reply of 23 August 1995, he is not challenging a final decision because he has failed to exhaust his internal remedies. His complaint is therefore irreceivable, there being no need to rule on the Agency's other objections to receivability.

## DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment Mr. Michel Gentot, Vice-President of the Tribunal, Mr. Edilbert Razafindralambo, Judge, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 30 January 1997.

*(Signed)*

MICHEL GENTOT E. RAZAFINDRALAMBO EGLI

A.B. GARDNER

***Registry's translation,***
***the French text alone***
***being authoritative.***

## EIGHTY-SECOND SESSION

***In re* Bisdorff (Nos. 1 and 2), Emering (Nos. 2 and 3), Frost (Nos. 1 and 2), Haines (Nos. 1 and 2), Hardy (Nos. 1 and 2), Heller (Nos. 1 and 2), Koolen (Nos. 1 and 2), Olivier (Nos. 1 and 2), Rue (Nos. 1 and 2), Thill (Nos. 1 and 2), Vermeij (Nos. 1 and 2), Watson (Nos. 2 and 3) and Willox (Nos. 2 and 3)**

**Judgment 1598**

THE ADMINISTRATIVE TRIBUNAL,

Considering the first set of complaints filed against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) by Mr. Norry Bisdorff, Mr. Paul Emering — his second complaint, Mr. Günter Frost, Mr. John Haines — his second, Mr. Jean-Lucien Hardy, Mr. Joachim Heller, Mr. Johannes Koolen, Mr. Lucien Olivier, Mr. Jean-Paul Rue, Mr. André Thill, Mr. Raymond Vermeij, Mr. Jeremy Watson — his second, and Mr. Jean-Pierre Willox — his second, on 29 June 1995 and corrected on 26 October 1995 and Eurocontrol's single reply of 16 February 1996;

Considering the second set of complaints against Eurocontrol filed by Mr. Norry Bisdorff — his second, Mr. Paul Emering — his third, Mr. Günter Frost — his second, Mr. John Haines — his third, Mr. Jean-Lucien Hardy, Mr. Joachim Heller, Mr. Johannes Koolen, Mr. Lucien Olivier, Mr. Jean-Paul Rue, Mr. André Thill, Mr. Raymond Vermeij — their second complaints, Mr. Jeremy Watson and Mr. Jean-Pierre Willox — their third complaints, on 29 June 1995 and corrected on 26 October 1995 and the Agency's single reply of 16 February 1996;

Considering the Registrar's letter of 14 August 1996 informing the complainants' counsel that since the time limit for rejoinder on both sets of complaints had expired on 3 June, the written pleadings had closed under Article 9(2) of the Rules of the Tribunal;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions;

## CONSIDERATIONS

In a letter of 28 August 1996 counsel informed the Registrar that the complainants wished to withdraw suit but were claiming an award of costs from Eurocontrol, and by a letter of 4 October 1996 the Agency said it had no objection to the withdrawal but considered the claim to costs to be irreceivable.

The withdrawal as such of the complaints is unconditional. That being so, the Tribunal cannot but record it: as it said in Judgment 951 (*in re* Groschel), it will not look into the reasons why complainants drop their original claims.

The new claim to costs is irreceivable because it was filed after the closure of the written proceedings.

## DECISION

For the above reasons:

1. Withdrawal of the complaints is recorded.
2. The complainants' claim to costs is dismissed.

In witness of this judgment Mr. Michel Gentot, Vice-President, Mr. Edilbert Razafindralambo, Judge, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 30 January 1997.

*(Signed)*

MICHEL GENTOT E. RAZAFINDRALAMBO EGLI

A.B. GARDNER

## EIGHTY-SECOND SESSION

***In re* Rota (No. 3)** **Judgment 1599**

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Mrs. Adriana Rota against the World Health Organization (WHO) on 22 August 1995 and corrected on 26 October, the WHO's reply of 14 February 1996, the complainant's rejoinder of 30 May and the Organization's surrejoinder of 4 September 1996;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant has been on the staff of the WHO since November 1984 at its Regional Office for the Americas (AMRO), in Washington, DC. She holds a fixed-term appointment as an office assistant II at grade G.5.

On 9 July 1993 she had a row with another staff member and slapped her face. By a memorandum of 25 August the chief of Personnel gave her a written reprimand under Staff Rule 1110.1.2 and assigned her to another office under another supervisor. The colleague got an oral reprimand.

The complainant appealed to the regional Board of Appeal on 23 November 1993. In its report of 21 July 1994 the Board recommended rejection. By a letter of 9 August the Regional Director endorsed that recommendation.

She then put her case to the headquarters Board in Geneva. In a report dated 28 March 1995 the headquarters Board recommended upholding the decision to reassign her but recommended removing the written reprimand from her personal file; issuing an oral reprimand instead; and paying up to 3,500 United States dollars towards her costs. In a letter of 23 May 1995 the Director-General told her he was refusing to withdraw the written sanction and to pay her costs. That is the decision she is impugning.

B. The complainant submits that the Director-General's decision is unlawful. She alleges breach of her right to a hearing, disproportion between penalty and offence, failure to discharge obligations incumbent on the Organization, and mistakes of fact.

She wants the Tribunal to quash the impugned decision and the earlier decision the Director of the Regional Office took on 9 August 1994; have her "official reprimand" taken out of the file; order her reinstatement in her old job; and award her moral damages and costs.

C. In its reply the WHO denies any mistreatment. The essential facts of the case are common ground. Written reprimand was a "moderate" sanction for a physical assault. In any event the decision to reassign the complainant was not a disciplinary measure, but a proper exercise of discretion in the Organization's own interests.

D. In her rejoinder the complainant enlarges on her pleas. She charges the Administration with overlooking essential facts and presses her claims.

E. In its surrejoinder the WHO points out that the impugned decision was warranted and in any event caused her no injury. The Organization extended her appointment by five years instead of the two she had had before. Since she has committed no further misconduct it has removed the written reprimand from her personal file.

## CONSIDERATIONS

1. The complainant is an office assistant II at grade G.5 at the WHO's Regional Office in Washington, DC. On 7 July 1993, a few days before she was to go on holiday, her supervisor, the Co-ordinator of Research and Technological Development in Health (HDR), told her to add information to a memorandum about the delegation of duties at times when she was absent. She typed that information at the end of the memorandum. Another member of the staff got a copy of the memorandum on 8 July. She saw that the complainant's work was to be assigned to her while the complainant was absent on holiday. She did not know who had taken the decision. On 9 July she went to the Co-ordinator's office to see him but he was not there. She then approached the complainant. The complainant says that in the dispute that then broke out she slapped her colleague on the face.

2. The chief of Personnel was unable to hear any explanation from the complainant until she came back from holiday six weeks later. After hearing both the complainant and her colleague the chief of Personnel issued a written

reprimand to her in a memorandum of 25 August 1993 which also told her that she was reassigned at once to the office of the Director of the Division of Health and Development. The other staff member got an oral reprimand. The complainant objected in a memorandum of 22 September to the chief of Personnel. In a reply dated 11 October the chief of Personnel told her that the decision had been taken after giving her the opportunity to state in full her own version of what had happened; the slap was "unworthy of the standard of conduct expected of a staff member", "simply unacceptable" and "not [to] be tolerated". Having exhausted her internal remedies without success the complainant is impugning the Director-General's decision of 23 May 1995 refusing to remove the written reprimand from her file and return her to her old position.

3. She pleads that she was "condemned without a hearing". She is mistaken. No decision was made until she had had an opportunity of giving her own version and she gave it.

4. She contends, first, that the written reprimand was a disproportionately heavy sanction; secondly, that she was singled out for punishment. Striking someone in the face at work is an act that the WHO was justified in treating as misconduct, which Staff Rule 110.8.1 defines as "any improper action by a staff member in his official capacity". The Organization rightly took the view that such violence at the workplace was not to be tolerated. The Director-General has discretion to take disciplinary action under Regulation 10.1 and, according to the gravity of the offence, may decide on an oral or written reprimand, reassignment with or without reduction in grade, dismissal for misconduct, or summary dismissal for serious misconduct. The sanction of a written reprimand was not disproportionate to the misconduct that consisted in striking another staff member. As for her second plea, she was not singled out for punishment since a sanction was imposed on the other staff member as well, even though it was justifiably a lesser one. So both her pleas fail.

5. She submits that reassigning her was a disciplinary sanction. But the chief of Personnel's memorandum of 11 October 1993 explained to her that the only sanction imposed on her was the written reprimand: reassignment was no sanction but ordered for the sake of harmony in the office and to cope with the workload of the Director's office. It complied with Rule 565.2, which reads:

> "A staff member may be reassigned whenever it is in the interest of the Organization to do so. ..."

True, it was perhaps unfortunate that the chief of Personnel told the complainant of reassignment in the same memorandum that imposed the written reprimand. But there is no proof that the reassignment was an additional sanction: her new duties were commensurate with her grade. She did not, as she says, lose the "chance for reclassification": the reclassification of the post was stopped because of the wider reforms that were taking place at the time. Nor has she since suffered any injury: she had her contract renewed for five years following a contract for two. What is more, as the chief of Personnel promised her shortly after imposing the written reprimand, it has actually been removed from her file because of favourable appraisal of her performance.

6. Again, the complainant is mistaken in alleging that the Organization presented no facts to justify the punishment. The slap alone provided the justification, the chief of Personnel taking the view that her explanation offered no excuse.

7. Lastly, the complainant contends that the Organization failed to provide a safe workplace and her supervisor did nothing to alleviate the situation between her and her colleague, and that was the direct cause of the incident. It is sheer misuse of language to make out that the incident was the outcome of the Organization's failure to ensure safety at work. The complainant is responsible for her own acts: it was she who committed the act of aggression.

8. The conclusion is that the Organization was justified in imposing on her a minor sanction for a minor incident, and her claims must therefore fail in their entirety.

## DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Michel Gentot, Vice-President, and Miss Mella Carroll, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 30 January 1997.

Wm Douglas

WILLIAM DOUGLAS

Michel Gentot

MICHEL GENTOT

Mella Carroll

MELLA CARROLL

A.B. Gardner

A.B. GARDNER

# EIGHTY-SECOND SESSION

***In re* Blimetsrieder, Denk and Hofmann (No. 4)**

**Judgment 1600**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Mr. Herbert Blimetsrieder and by Mr. Heinz Denk and the fourth complaint filed by Mr. Dieter Gerhard Hofmann against the European Patent Organisation (EPO) on 4 May 1995, the EPO's single reply of 2 August, the complainants' rejoinder of 6 October, the Organisation's surrejoinder of 7 November 1995 and the further submissions which the EPO, at the Tribunal's instructions, supplied on 30 July 1996;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which none of the parties has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainants are permanent employees of the European Patent Office, the secretariat of the EPO. In 1993 each of them was promoted to grade A4 on a post for a principal examiner.

They asked the President of the Office in letters they sent in the first half of March 1993 to promote them to A4 at various dates in 1992. The Director of Personnel refused in letters dated 15 and 22 March, and they lodged internal appeals at dates from 19 March to 14 April 1993.

In a single report dated 18 November 1994 on their appeals the Appeals Committee recommended promoting each of them at the date they wanted and awarding the difference in pay plus interest thereon at 10 per cent a year.

By individual letters of 8 February 1995, which they impugn, the President rejected their appeals.

B. The complainants submit that it was unlawful to deny them promotion in 1992. They allege breach of equal treatment. According to the criteria in the President's note of 12 June 1988 to the chairman of the Promotion Board they were entitled to promotion before another official who did get promotion to

A4 in 1992. The EPO's reliance on what must have been "subjective" criteria in her favour constitutes a "flagrant misuse of power".

Mr. Blimetsrieder claims his promotion to A4 as from 1 September 1992, Mr. Denk as from 1 February 1992 and Mr. Hofmann as from 1 November 1992. They seek payment of the sums due to them by way of remuneration at the higher grade, plus interest at 10 per cent a year, and awards of 3,500 German marks each in moral damages and of 4,000 marks each in costs.

C. In its reply the EPO contends that the President's decisions not to promote the complainants in 1992 were taken in the proper exercise of his discretion. Fulfilment of the conditions "imposed" does not entitle anyone to promotion since they constitute a "minimum" standard which the President may raise as he sees fit. Since "extraordinary" circumstances warranted promoting the other staff member in 1992 there was no breach of equal treatment. Besides, even if her promotion had been unlawful that would not have warranted promoting the complainants: there must be equality in observance of the law, not in the breach of it.

D. In their rejoinder the complainants enlarge on their pleas and press their claims. In their submission the President erred by assessing the other staff member's merits against criteria other than the objective ones that governed the appraisal of their own performance.

E. In its surrejoinder the Organisation presses the arguments in its reply, maintaining in particular that it was in its interests to promote the other staff member in 1992.

## CONSIDERATIONS

1. The European Patent Organisation employs the complainants as principal examiners. They were all promoted to grade A4 as from various dates in 1993 but they claim the promotion as from various dates in 1992. The dispute arose when another staff member was promoted from A3 to a post of principal administrator at A4 as from 1 August 1992.

2. Promotion is governed by Article 49 of the Service Regulations. Paragraph 2 provides that no promotion may be granted unless there is a vacant post in the category or grade concerned; paragraph 4 that the President of the Office must make his decision after consulting a Promotion Board. According to paragraph 5 the Board is made up of a chairman, two members nominated by the President and two nominated by the Staff Committee. The chairman votes only on procedural matters or in the event of a tie. Paragraph 7

states that promotion shall be by selection from among permanent employees who are found after consideration of their ability and of reports on them to qualify. Paragraph 10 requires the President to forward to the Board the names of those who qualify. The Board then — says paragraph 10 — examines the personal files of each of them and may interview any if it wishes. It draws up a list of them in order of merit and submits it to the President together with a reasoned report.

3. The President issued guidelines to the Promotion Board in a note dated 12 June 1988. It says that promotion from A3 to A4 will be granted to someone whose general rating is "very good" normally when he has from 15 to 18 years' reckonable experience and is between 40 and 44 years of age.

4. The complainants were not on the list of promotions for 1992 and each of them filed an internal appeal. In its report the Appeals Committee held that there had been a departure from the normal procedure and breach of equal treatment. The other staff member had not been on the list of those eligible for promotion which the Board had forwarded to the President and her record of performance had not met the minimum requirement. The Committee recommended promoting the complainants from appropriate dates in 1992 and paying them the difference in remuneration together with interest thereon at 10 per cent a year.

5. The President rejected the Appeals Committee's recommendations. In letters he wrote to the complainants on 8 February 1995 — the decisions now impugned — he said:

> "... other information than only staff reports may be taken into account for the assessment of the merits of an individual staff member. Such may well include my own experience with a particular staff member, as well as social aspects or other circumstances not directly relating to the work performed by the staff member, but which are nevertheless of importance in view of the proper functioning of the Office."

6. The complainants contend that the principle of equal treatment precludes the President's taking account, as he did in this instance, of personal opinions and subjective criteria. In their submission the Promotion Board is the only body competent to list the qualified employees in order of merit on the strength of objective and comparable evidence such as length of reckonable experience and performance as recorded in staff reports.

7. The Organisation replies that the authority to decide on promotion rests exclusively with the President and the Promotion Board's list contains mere proposals. It further submits that both President and Board are free to

take into account not only the general ratings in staff reports but also, subject to limited review by the Tribunal, any other criteria they think appropriate.

8. By minutes of 9 November 1992 the Promotion Board asked the competent "line managers" and reporting officers whether there had been any changes since the 1990-91 reporting period in the performance by Mr. Denk, Mr. Hofmann and the other staff member of their duties. The Board asked for the information by 4 December 1992. The replies about Mr. Denk and Mr. Hofmann were that the latest assessments of their performance held good. On 25 November 1992 the other staff member's supervisors wrote a note that was addressed to Mr. Huguet, who is in charge of the administration of performance reports, and was intended for the Promotion Board but contained statements totally irrelevant to the precise and unambiguous question that the Board had asked; it said, for example, that "applicants no more qualified" than the other staff member had been recruited "at around the same time in grade A4 and even A5". According to evidence provided by its members the Board neither saw that letter nor got the information it had asked for about the other staff member. The Tribunal does not accept the Organisation's argument that the Board had a duty to "ask for the requested information rather than rejecting [the other staff member's] candidature". Neither does it accept the Organisation's suggestion that the letter was sent but some members of the Board failed to consider it properly.

9. In its report of 17 December 1992 to the President the Board expressed the opinion as to the other staff member that "The short period of three years and four months is not sufficient as a basis for a record of performance justifying a promotion to A4 with 16 years' experience". In comparing the merits of candidates it was not unreasonable for the Board to specify a minimum period in which their performance should be assessed.

10. The Organisation admits that it was the note of 25 November 1992 about the other staff member that "prompted" the President to promote her. To the extent that the letter referred to special circumstances relating to the performance of her duties the Board should have been put in a position to consider them. Article 49 of the Service Regulations and the guidelines laid down by the President for the Promotion Board establish a promotion procedure of which the fairness and impartiality are ensured as far as possible by the presence of staff representatives on the Board. If the Board is denied information it seeks or if a decision to promote is taken against the Board's advice and on the basis of considerations other than ability and the record of performance, as prescribed in Article 49(7) of the Service Regulations, then fairness and impartiality can no longer be ensured. The reasons given for the

impugned decisions are inappropriate for the promotion procedure established by Article 49 and amount to denial of the equal treatment the complainants were entitled to.

11. The Organisation argues that even if there were irregularities in the other staff member's promotion the complainants would not be entitled on that account to promotion in 1992. That is so. Inasmuch as the complainants do not seek the quashing of the President's decision to promote the other staff member, the Tribunal will award each of them 3,500 German marks in moral damages for breach of the Service Regulations and of the principle of equal treatment and 1,000 marks in costs.

## DECISION

For the above reasons,

1. The Organisation shall pay each of the complainants 3,500 German marks in damages.
2. It shall pay each of them 1,000 marks in costs.
3. Their other claims are dismissed.

**In witness of this judgment Sir William Douglas, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.**

**Delivered in public in Geneva on 30 January 1997.**

Wm Douglas

**WILLIAM DOUGLAS**

Mella Carroll

**MELLA CARROLL**

**MARK FERNANDO**

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

A.B. Gardner

**A.B. GARDNER**

*Registry's translation,*
*the French text alone*
*being authoritative.*

# EIGHTY-SECOND SESSION

## *In re* Aelvoet (No. 5) and others

## Judgment 1601

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Mr. Daniel Aelvoet — his fifth — Mrs. Geneviève Alberty, Mrs. Marianne Carpentiers, Mrs. Gráinne Cronin, Mrs. Danielle Delbrassinne, Mr. Paul-Henri Fastenaekens, Mrs. Françoise Goovaerts, Miss Marie-José Graas — her second — Mrs. Annyck Guillard, Mrs. Linda Lang, Mrs. Rosemarie Lesch, Mrs. Michelle Macharis, Mrs. Marie-Thérèse Meloni, Miss Valérie Meyer — her second — Miss Iris Neumann, Mrs. Jacqueline Niebel, Mrs. Violaine Renard, Mrs. Marie-Laurence Smulders, Mrs. Roberte Stroobants, Mrs. Suzanne Stroobants, Mrs. Viviane Tamboise, Mr. Georges Tsolos, Mr. Georges van Campenhout, Mrs. Joceline Vanelven, Mrs. Renée van Lierde and Mrs. Els Vanhoven against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 4 December 1995 and corrected on 10 January 1996, Eurocontrol's reply of 26 April, the complainant's rejoinder of 14 July and the Agency's surrejoinder of 18 October 1996;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which none of the parties has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Judgments 1403 *(in re* Tejera Hernandez) and 1411 (*in re* Bidaud) explain under A how an employee of Eurocontrol at grade C may qualify for the grant of a "typist's allowance".

Office notice 2/95 of 11 January 1995 amended Article 4a, Section 2a, of Rule No. 7 of the Rules of Application of the Staff Regulations: the Director General thereby announced that as from 1 July 1995 the allowance would be payable only to someone who was doing secretarial work in an administrative unit. Office notice 7/95 of 1 March 1995 published a list of the posts conferring entitlement to the allowance.

On 16 March the Agency's Staff Association asked the Director General to hold the consultations provided for under the agreement on consultation, conciliation and arbitration which Eurocontrol had concluded on 9 January 1992 with the staff unions. The Director General refused in a letter of 19 April 1995 to the vice-chairman of the Association on the grounds that the agreement did not cover office notices issued by the Director General.

On 29 May the complainants lodged internal "complaints" with the Director General under Article 92(2) of the Staff Regulations against office notices 2 and 7. Their "complaints" went to a Joint Committee for Disputes that had been set up under office notice 6/95 of 1 March 1995.

By office notice 10/95 of 2 June 1995 the Director of Human Resources told the staff on the Director General's behalf that the measures announced in 2 and 7 were postponed *sine die* and that a final decision would be taken and announced as soon as possible.

The Joint Committee met on 11 July. It recommended rejecting the "complaints" on the grounds that they disclosed no cause of action and were therefore irreceivable. By letters of 5 September 1995, the impugned decisions, the Director informed the complainants of the Director General's endorsement of that recommendation.

By office notice 19/95 of 22 December 1995, which superseded 2, 7 and 10, the Director General summarily revoked Article 4a of Rule No. 7 and announced that anyone who was entitled to the allowance would be paid an equivalent amount until further notice.

B. The complainants contend that office notices 2/95 and 7/95 are unlawful. Citing Judgment 1148 (*in re* Scheu Nos. 1 and 2), they submit that the Director General may not treat 2/95 or any of his other notices as rules. It is not he who sets staff pay but the Committee of Management and the Permanent Commission of Eurocontrol. The Agency failed to consult the staff associations before adopting the two notices, and that was in breach of the agreement it concluded with them on 9 June 1992. There was also breach of their acquired rights in that the grant of the allowance may persuade someone to join, or to remain on, the staff of the Agency.

The complainants seek the quashing of the decisions of 5 September 1995 rejecting their internal appeals and of notices 2/95 and 7/95. Failing that, they ask the Tribunal to adjourn its ruling on the merits pending a final decision by the Director General to revoke the notices or, failing that again, to refer the matter to the Joint Committee for Disputes.

C. In its reply the Agency pleads that the complaints are irreceivable on several counts. First, the two office notices are general administrative decisions. They were not followed by individual implementing decisions and so are unassailable before the Tribunal. Besides, at the time of filing the complainants had no cause of action, the notices having been suspended *sine die*. In any event the complaints serve no purpose after the publication of office notice 19/95 of 22 December 1995.

Eurocontrol's pleas on the merits are subsidiary. It submits that the Director General's power under the Staff Regulations to make rules is not subject to prior approval by any other authority of the Agency. The Committee of Management exercises its supervisory authority only after the Director General has actually amended the Rules of Application. Besides, it is not the Regulations that determine the grant of the allowance. The authority to create and abolish allowances and to set the criteria for granting them lies with the Director General under Article 100. The agreement of 9 January 1992 with the staff unions lays down a special procedure for disputes about implementation. The challenged decisions have never affected the complainants as individual staff members.

D. In their rejoinder the complainants concede that, the Director General having adopted office notice 19/95, they no longer have any cause of action.

E. In its surrejoinder the defendant asks the Tribunal to hold that the case calls for no ruling, being "pointless and vexatious" and "pressed on no rational grounds", and to order the complainants to bear the costs in full, including those it is to be charged under Article IX(2) of the annex to the Tribunal's Statute.

## CONSIDERATIONS

1. The complainants are staff members of Eurocontrol in category C. Article 4a, Section 2a, of Rule No. 7, which applies the Staff Regulations governing officials of the Agency, introduced what is called a "typist's allowance", and office notice 29/65 of 28 June 1965 is about how to qualify for it. The complainants are paid the allowance.

2. On 11 January 1995 the Director General issued office notice 2/95 to amend the conditions governing payment. An annex to the notice said that "officials in category C performing secretarial tasks in an administrative unit shall be paid a fixed allowance pursuant to the conditions set out in an office notice" and that "the list of posts giving entitlement to such an allowance shall

shall be drawn up by the Director [of] Personnel". Paragraph 6 stated that the amendment and the implementing provisions would apply as from 1 July 1995.

3. The Director General issued office notice 7/95 of 1 March 1995 to give effect to 2/95. It provided for a "functional" allowance that was "linked to the performance of the specific tasks of a 'Head of Secretariat' post". It listed the posts that conferred entitlement to the allowance and the names of the staff on those posts.

4. In a letter of 16 March 1995 the Staff Association asked the Director General to hold the consultations provided for under the agreement of 9 January 1992 between the Agency and the staff unions. The Director General refused, and the Association thereupon asked the chairman of the Permanent Commission of Eurocontrol to order that the procedure for consultation be followed.

5. On 29 May 1995 the complainants lodged internal "complaints" under Article 92(2) of the Staff Regulations asking for the withdrawal of the two notices and for a declaration that the Director General had acted unlawfully in failing to suspend the effect of them pending a decision by the Permanent Commission.

6. On 2 June 1995 the Director General issued office notice 10/95, which reads as follows:

> "The measures provided for in Office Notices No. 2/95, dated 11.1.95, and No. 7/95, dated 1.3.95, are deferred until further notice.
>
> A final decision will be taken and staff notified accordingly at the earliest opportunity."

7. The "complaints" were referred to the Joint Committee for Disputes. It held that they showed no cause of action and were therefore irreceivable. In identical letters of 5 September 1995 the Director of Human Resources told each of the complainants that the Director General had endorsed the Committee's conclusion. Those are the decisions they are impugning.

8. Though filed separately on 4 December 1995, the complaints raise the same issues of fact and of law and may therefore be joined to form the subject of a single judgment.

9. Eurocontrol contends that the complaints are irreceivable. It says that notices 2/95 and 7/95, which the complainants challenged in their internal appeals, are general administrative decisions affecting a class of officials. So no appeal against them lies to the Tribunal, which rules only on

individual disputes. It cites the list of names in 7/95 as evidence that the notice did not constitute a decision adversely affecting the complainants, the less so as it was not followed by any implementing provisions and the complainants continued to receive the allowance.

10. As the Tribunal has already held — for example, in Judgment 1081 (*in re* Albertini and others) under 4 — the mere fact that a decision affects a category of staff and is therefore a general one does not preclude challenge. To be challengeable a decision need not be an individual one but may be general. To quote Article VII(2), which is about the time limits, a complainant may challenge "a decision affecting a class of officials".

11. Yet not every complaint that challenges a general decision will be receivable. The complainant must comply with the requirement in Article VII(1) of the Tribunal's Statute that internal remedies be first exhausted. In keeping with that rule and with precedent — for example Judgment 1134 (*in re* Ngoma) under 4 — "a complaint will be irreceivable if it challenges a general decision that must ordinarily be put into effect by individual decisions against which internal appeal will lie".

12. In the light of the foregoing 2/95 and 7/95 are to be distinguished. By both its content and its context 2/95 is general enough to affect all the complainants together and so to require individual implementing decisions. It does, it is true, amend Article 4a of Rule No. 7 to read:

> "Officials in category C performing secretarial tasks in an administrative unit shall be paid a fixed allowance pursuant to the conditions set out in an office notice."

Yet the draughtsman thought that text so general in scope as to warrant a further clause to say that "The list of posts giving entitlement to such an allowance shall be drawn up by the Director [of] Personnel". So the complainants obviously had to read the list to find out whether they were to get the allowance or not. Since 2/95 is undoubtedly a general decision the complaints are irreceivable insofar as they challenge it.

13. Notice 7/95 is another matter. It implements 2/95 by listing the posts that confer entitlement to the "functional" allowance that was to supersede the lump-sum one and by naming the staff on those posts. The omission of the complainants' names meant that they were no longer to get the lump-sum allowance that was to be replaced; so they did have a cause of action by 29 May 1995, the date at which they filed their internal appeals, and were entitled to seek the withdrawal of notice 7/95 of 1 March 1995.

14. But were the complaints to the Tribunal receivable at 4 December 1995, the date of filing? As Eurocontrol observes, notice 10/95 of 2 June

1995 announced that the measures provided for in 2/95 and 7/95 were held over *sine die* but that a final decision would be taken and issued as soon as possible. The Agency submits that the suspension of the impugned decisions means that they are no longer challengeable, the complainants having no cause of action.

15. The plea is mistaken. For one thing, 10/95 said nothing of the substance of the disputed measures but was about the date of their entry into force. So there was nothing to preclude their being put into effect fairly soon and the complainants still had reason to seek the outright withdrawal of provisions that might cause them injury even if, as Eurocontrol alleges, no actual injury was then ascertainable.

16. Indeed Eurocontrol realised as much itself since by notice 19/95 of 22 December 1995 it cancelled 2/95 and 7/95 in anticipation of a ruling by the Tribunal as to whether they were lawful. Only when 19/95 went out did the complainants, as indeed they admit, lose their cause of action.

17. Since the reversal of the disputed measures came only after the filing of the complaints and the complainants were therefore put to needless expense, their claim to costs succeeds. Eurocontrol's counterclaim to an award of costs against the complainants is dismissed.

## DECISION

For the above reasons,

1. The Tribunal need not rule on the complaints.
2. Eurocontrol shall pay the complainants a total of 100,000 Belgian francs in costs.

In witness of this judgment Mr. Michel Gentot, Vice-President of the Tribunal, Mr. Edilbert Razafindralambo, Judge, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 30 January 1997.

*(Signed)*

MICHEL GENTOT E. RAZAFINDRALAMBO EGLI

A.B. GARDNER

Organisation internationale du Travail
*Tribunal administratif*

International Labour Organization
*Administrative Tribunal*

## EIGHTY-SECOND SESSION

***In re* Moreno de Gómez**
**(Application by UNESCO**
**for review)**

**Judgment 1602**

THE ADMINISTRATIVE TRIBUNAL,

Considering the application filed by the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 16 August 1996 for review of Judgment 1553;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Article 7, paragraph 2, of its Rules;

Having examined the written submissions;

### CONSIDERATIONS

1. This is an application by UNESCO for the review of Judgment 1553, which the Tribunal delivered on 11 July 1996 on the complaint of Mrs. Yocasta Moreno de Gómez. The application rests on the grounds that the Tribunal misunderstood its own case law and thus committed a serious mistake of law.

2. As the Tribunal has declared in Judgment 442 (*in re* de Villegas No. 4) and confirmed in many later judgments, an alleged mistake of law does not afford admissible grounds for the review of a judgment. For that reason alone the application cannot but fail. But so as to dispel any doubt about how to apply Staff Regulation 4.4 the Tribunal will, in a departure from usual practice, provide the further explanation set out below.

3. UNESCO cites Judgment 107 (*in re* Passacantando) in answer to the complainant's comments about Regulation 4.4 and about the construction that Judgment 133 (*in re* Hermann) put on that Regulation.

4. Judgment 107 does not contradict Judgment 133, which 1553 cited under 23. In Passacantando the material rule, which was Staff Regulation 301.044 of the Food and Agriculture Organization of the United Nations (FAO), said that, "without prejudice to the recruitment of fresh talent at all levels, the fullest regard shall be had, in filling vacancies, to the requisite

qualifications and experience of persons already in the service of the Organization". The Tribunal held that the Organization's obligation to have regard to their qualifications implied that such persons were entitled to take part in any competitions that might be open to them and that every candidate must be treated on an equal footing and with full impartiality; but that persons already in the service of the Organization must be given priority if their qualifications appeared to be at least equal to those of other candidates.

The Tribunal made similar rulings in Judgment 133, which was about the application of UNESCO Staff Regulations 4.1 to 4.4 and Staff Rules 104.1 and 104.2 and about the right to priority of consideration prescribed therein. It held that UNESCO could not be expected to assign someone whose post had been abolished to a post for which he was not qualified, whatever the length of his service might be. It gave further explanation in Judgment 1553 under 23 of the right to priority of consideration. It has indeed followed that line of precedent in applying like rules in other organisations: see for example Judgment 1323 (*in re* Morris No. 2).

The conclusion is that the right to priority of consideration that belongs to someone whose post has been abolished requires that any authority concerned with making the appointment must be aware of the right and carefully compare the professional profile of the staff member with that of any outside candidate.

5. Judgment 1553 applied those precedents to the case of Mrs. Moreno de Gómez, the *ratio* being as follows.

In June 1992 the Organization set about finding a post to which she could be reassigned. On 5 August 1994 it started further attempts but on 10 November 1994 told her that they had failed. Yet in none of those attempts did it give instructions that she should be afforded priority of consideration for appointment to any vacant post.

Following Judgment 133, the Tribunal held that because of her long record of fully satisfactory service she was entitled to priority of consideration for appointment to any post she was qualified for, even though other candidates might have an edge over her in qualifications and experience and even though her professional profile did not exactly fit the post, provided that she had the capacity to perform the duties competently. The conclusion was that UNESCO's search for a suitable post for the complainant had been unduly restricted and it had not granted her the priority of consideration she had been entitled to under Regulation 4.4.

So Judgment 1553 is quite in line with the case law.

6. Being clearly irreceivable, UNESCO's application must be summarily dismissed under Article 7(2) of the Tribunal's Rules.

## DECISION

For the above reasons,

The application is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Edilbert Razafindralambo, Judge, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 30 January 1997.

Wm Douglas

WILLIAM DOUGLAS

E. RAZAFINDRALAMBO

EGLI

INTERNATIONAL LABOUR ORGANISATION ADMINISTRATIVE TRIBUNAL GENEVA

A.B. Gardner

A.B. GARDNER

Organisation internationale du Travail
*Tribunal administratif*

International Labour Organization
*Administrative Tribunal*

*Registry's translation,*
*the French text alone*
*being authoritative.*

# EIGHTY-SECOND SESSION

## *In re* Bensoussan, Bongiovanni, and Freeman (No. 3)

## Judgment 1603

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Mr. Yves Bensoussan and Mr. Giacomo Bongiovanni and the third complaint filed by Mr. Edward James Freeman against the Food and Agriculture Organization of the United Nations (FAO) on 14 September 1995 and corrected on 27 November 1995, the FAO's single reply of 13 March 1996, the brief submitted by the International Civil Service Commission (ICSC) also on 13 March, the complainants' rejoinder of 17 June, the ICSC's further submissions of 8 August and the Organization's surrejoinder of 5 September 1996;

Considering Article II, paragraph 5, of the Statute and Article 13, paragraph 3, of the Rules of the Tribunal;

Having examined the written submissions and decided not to order hearings, which none of the parties has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainants belong to the Professional and higher categories of staff of the FAO and as such are participants in the United Nations Joint Staff Pension Fund. As in the other organisations of the United Nations common system, the base salary of such staff may be put up by an amount, known as "post adjustment" that is calculated to impart the same purchasing power to the pay of staff wherever they may be stationed. Judgment 1457 (*in re* Di Palma and others) explained under 2 to 9 how post adjustment works.

A "post adjustment index" is used to gauge the cost of living at each duty station as against New York, which is the standard of comparison for the whole common system. On 21 December 1989 the General Assembly of the United Nations adopted a resolution, No. 44/198, on a recommendation by the International Civil Service Commission. It thereby did away with what had been called "regressivity" and decided to treat pension contributions as a "separate item" of the index.

An old edition of the Commission's booklet "The post adjustment system — What it is, how it works" described "regressivity" in the following terms:

> "Post adjustment is not pensionable and is not a full compensation for total cost of living or exchange rate movement in a given location. The compensation covered by post adjustment varies from 4.1% for every 5% change in cost-of-living at the D.2 level to 4.5% for every 5% at P.1, with an average figure of 4.35% in the P.4 grade. Although currency fluctuations are immediately adjusted for, and at times may be implemented along with changes due to cost-of-living, as a general rule, a change of post adjustment is only effected when cost-of-living as measured by the post adjustment has moved a full 5% over its previous level.
>
> The amount of the adjustment is a percentage of net base salary, which varies with grade and step. For example, at P.1 step I it is 0.889% and at P.5 step V it is 0.852% for each 1% increase in the cost of living expressed in US$ terms. This decreasing rate is known as vertical regressivity and it accounts for three elements in the total picture of the Professional salary structure. First, it accounts for the fact that the pension contribution of a staff member (which is fixed in US$) is not included in the cost of living; every staff member, in fact, contributes 7 per cent of pensionable remuneration to the [United Nations Joint Staff] Pension Fund and this is not affected by the local cost of living. Secondly, the regression in the rates of compensation from the lower to the higher grades is based on the premise that the impact of higher costs is felt more severely by those with lower incomes than by those with higher incomes. Finally, it is an adjustment to net salary levels and therefore has to reflect the fact that other similar adjustments in a national context are usually based on gross income and thus are subject to progressive tax rates."

After consulting the Pension Fund the Commission worked out in July 1990 a method of giving effect to resolution 44/198. Whenever pension contributions went up the amount due in post adjustment was to go down by one-third of the increase. In time it emerged that that entailed "double counting" since not only was the post adjustment being reduced but the deductions made from pay to meet pension contributions were being increased. So the staff were having to contribute more than their prescribed share, which was one-third, of total payments.

By letters of 27 October and 29 December 1994 the complainants, citing FAO Staff Rule 302.3171, asked the Director-General to pay them for each of the last 24 months the difference between the amount of post adjustment they had actually been paid and that which they believed they were entitled to. They also asked to be paid the "correct amount" of the post adjustment for each month thenceforth. By letters of 28 December a personnel officer informed Mr. Bensoussan and Mr. Bongiovanni that their claims had been rejected. The Director of Personnel notified the same decision to Mr. Freeman in a letter of 24 January 1995. By memoranda of 24 March the complainants lodged appeals with the Director-General.

Having noticed that its new method was having unintended and unwanted effects, the Commission decided at its 41st Session, which it held from 1 to 19 May 1995, that it would take account of "actual" pension contributions in the post adjustment index as from the date of "the next adjustment of the global scale of pensionable remuneration". That date was 1 November 1995.

By letters of 22 June 1995 the Deputy Director-General informed the complainants of the Director-General's decision to reject their appeals in part: the Organization would be applying to them the adjusted pay scale as reckoned by the ICSC as from 1 November 1995, the Commission's own date, but would not grant them retroactive compensation. Those are the decisions they are impugning.

B. In the complainants' submission the ICSC's decision of July 1990 was undoubtedly unlawful. The Commission itself eventually admitted to a technical flaw which was adversely affecting staff pay. Besides, it proved dilatory: in 1993 it put to the Advisory Committee on Post Adjustment Questions (ACPAQ) the matter of excluding pension contributions from the post adjustment index, then held over discussion to its 41st Session, in May 1995.

Judgment 1265 (*in re* Berlioz and others), which the complainants cite, recalled "the duty of any organisation that introduces elements of the common system or any other outside system into its own rules to make sure that the texts it thereby imports are lawful". The FAO made a mistake of law by endorsing a decision of the Commission without ascertaining that it was sound in law and in fact.

The complainants ask the Tribunal to quash the Director-General's decisions of 22 June 1995 and to order the FAO: (1) to pay them the difference between the amounts of the post adjustment allowance they should have received from 27 October 1992 up to the date at which the Commission's mistake was put right — but from January 1993 to December 1994 for Mr. Freeman — and those they actually got, plus interest at the rate of 10 per cent a year and (2) to refund their costs. Mr. Bensoussan and Mr. Bongiovanni also claim payment of the amounts of post adjustment which they are entitled to as from the date of the correction.

C. In its single reply the FAO submits that, having accepted the Commission's Statute, it was bound to apply the prescribed method for reckoning post adjustment. Though it has a duty to ascertain that the Commission's decisions are lawful, there was nothing unlawful about that method. In 1993 the Commission put the matter to the ACPAQ to sort out, then held over its own discussion to its 41st Session, in May 1995, because the ACPAQ's report was not available in French, one of its two working languages.

Though acknowledging that Rule 302.3171 applies, the FAO submits that, even if the Commission's decision were unlawful, no figure could be put on the injury to staff. The Organization's own rules do not provide for the payment of interest in such circumstances.

D. In its observations the Commission points out that the system of post adjustment and the method of accounting for pension contributions are complex. The mistake in the method it introduced in 1990 went unnoticed for three years; so it was not an obvious one and the FAO did not act unlawfully by falling in line. The Commission denies being unhelpful by asking the ACPAQ in 1993 to look at the matter again or holding over its own decision.

By challenging the rejection of their claim to retroactive correction the complainants are seeking damages for decisions which they have never impugned: "no rule or precedent requires organisations to make retroactive redress for their decisions in such circumstances".

E. In their rejoinder the complainants press their pleas. They maintain that the decision the Commission took in 1990 was unlawful because it rested on a mistake of fact. The FAO had known since 1993 that it was flawed and was impairing the rights of staff. The Organization has already paid retroactive compensation to staff at least twice, in 1988 and 1992, for mistakes made by the Commission in reckoning post adjustment.

F. In further submissions the Commission presses its arguments and maintains that the method introduced in May 1995 may not be used to reckon adjustments made before November 1995 and the complainants are therefore not entitled to retroactive post adjustment.

G. In its surrejoinder the FAO again denies having acted unlawfully by applying the Commission's decision of 1990. There was no telling at the time that the decision was fundamentally flawed; so compliance was only reasonable. The Organization was bound by the Commission's decision of May 1995 to apply a new method of reckoning as from November 1995, and had no reason to apply it retroactively.

## CONSIDERATIONS

1. The complainants were at the material time all employees of the FAO at its headquarters in Rome. They are challenging decisions by the Director-General of the Organization not to pay them the difference between the amounts they say should have been paid in post adjustment in the twenty-four months preceding the date of making their claims and the amounts they were actually paid. They further claim interest thereon.

2. The International Civil Service Commission defines post adjustment as "an amount paid in addition to net base salary, which is designed to ensure that no matter where United Nations Common System staff work, their take-home pay has a purchasing power equivalent to that at the base of the system, New York". A post adjustment allowance is payable to staff in the Professional and higher categories of staff of the common system of the United Nations, to which the FAO belongs.

3. To ensure that the take-home pay of staff in the common system has the same purchasing power at other duty stations as at New York, account is taken in reckoning post adjustment of the cost of goods and services at duty stations. One material item is the sums deducted from staff pay in contributions to the United Nations Joint Staff Pension Fund. How are such deductions to affect the reckoning of post adjustment? The Commission works out the method of determining post adjustment: see for example Judgments 1265 *(in re* Berlioz and others) and 1266 (*in re* Cussac and others). For the purpose of reckoning the effect of pension contributions it has recently made changes to correct the flaws of the method it introduced in July 1990. It became clear in 1993 that that method was perverse in that, as the FAO points out, it was serving to lower the figure of the post adjustment allowance "by one third of the amount of any increase in pension contributions, while the deductions made from staff pay were increased by the same amount". Though the authorities saw as much as early as 1993, not until 1995 did the Commission, after much shilly-shally, at last do something: it endorsed a recommendation from the Advisory Committee on Post Adjustment Questions (ACPAQ) for counting "actual" pension contributions at each updating of the post adjustment index. But the Commission parted ways with the Committee by deciding that the change would come in as from 1 November 1995 instead of the second quarter of 1996.

4. Mr. Bensoussan and Mr. Bongiovanni had lodged claims on 27 October 1994 and Mr. Freeman on 29 December 1994. Having put the Commission's decisions into effect, the FAO told the complainants that the

new method of reckoning the index would apply to them as from 1 November 1995. They are impugning the final decisions that the Director-General took on 22 June 1995 refusing to apply the new method retroactively to their post adjustment allowance. They contend that by condoning a flawed method the Organization acted in bad faith; that its belief that it was bound by the Commission's decision and its refusal to pay interest on arrears amount to mistakes of law; and that it is so doubtful of being in the right that it has made provision in its budget for 1996-97 against the retroactive payments they are claiming.

5. There is one general point worth making before going into those pleas. It is indeed common ground. The Commission may make recommendations for aligning conditions of service in the common system and may decide on the methods of determining them. Yet the staff may still challenge any action by that body, independent though it be of the organisation that employs them. As was said in Judgment 1000 (*in re* Clements, Patak and Rödl), to cite but one —

> "... when impugning an individual decision that touches him directly the employee of an international organisation may challenge the lawfulness of any general or prior decision, even by someone outside the organisation, that affords the basis for the individual one."

So the complainants may challenge the lawfulness of the Commission's method up to November 1995 even though the FAO has done no more than fall in line. On that score the Organization is wrong in pleading that they are out of time: the staff may always challenge in law the rules that are applied to them. In any event the Staff Rules of the FAO allow a claim to payment of amounts due in the immediately preceding twenty-four months.

6. The foremost issue, then, is the lawfulness of the method followed from 1990 to 1995 for reckoning post adjustment. As a matter of fact there is no one method that can be said to pass muster in law, whether it counts pension contributions in full, or only in part, or discounts them altogether, in the tally of expenditure by staff. As the Commission says in its comments on the complaints, such contributions do amount to expenditure in that they reduce take-home pay; yet they are investment too. That they partake of both explains why the ACPAQ faltered and wavered so. There is no faultless method to be found here; the draughtsman's purpose must be to work things out as fairly as he can and, whichever method of reckoning may be followed, check any damage it may cause. The method introduced in 1995 served the purpose better than the one it superseded; but the method in use from 1990 to 1995 was not for all that unlawful.

7. The conclusion is that there is no merit in the complainants' plea that the Commission's decisions up to 1995 and the FAO's applications thereof were unlawful. Nor did the Commission take too long, as they contend, to change the method once its unwanted effects had shown up. As defendant and Commission have alike pointed out, the system of post adjustment is complex. It is plain on the evidence that sure and abiding results are scarcely attainable.

8. Since the method that was dropped in 1995 was not in itself unlawful, the complainants are not entitled to the retroactive correction of pay that each of them claims. The FAO's sensible precaution of putting in its budget the wherewithal to execute a ruling in their favour is obviously no argument in support of their case. In sum, there was neither mistake of law nor bad faith in applying decisions by the Commission that were lawful.

## DECISION

For the above reasons,

The complaints are dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Michel Gentot, Vice-President, and Miss Mella Carroll, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 30 January 1997.

*(Signed)*

WILLIAM DOUGLAS MICHEL GENTOT MELLA CARROLL

A.B. GARDNER

# EIGHTY-SECOND SESSION

***In re* Damond (No. 2), Di Palma (No. 2), Hansson (No. 3), Ilardi (No. 2), Mossaz (No. 2), Pautasso (No. 2), Royles (No. 2), Schwarz (No. 2), Yossifov (No. 2), and Zotin (No. 2)**

**Judgment 1604**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaints filed by Mrs. Andrée Damond, Mr. Salvatore Di Palma, Mr. Alfredo Ilardi, Mr. Bernard Mossaz, Mr. Marco Pautasso, Mr. Malcolm Royles, Miss Linda Schwarz, Mr. Vladimir Yossifov and Mr. Sergei Zotin and the third complaint filed by Mr. Bo Hansson against the World Intellectual Property Organization (WIPO) on 3 October 1995, the brief filed by the International Civil Service Commission (ICSC) on 30 January 1996, the Organization's single reply of 8 March, the complainants' rejoinder of 11 April, the Commission's comments thereon of 23 May and the letter of 1 July 1996 from the Director General of WIPO informing the Registrar of the Tribunal that the Organization did not wish to enter a surrejoinder;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Article 13, paragraph 3, of its Rules;

Having examined the written submissions and decided not to order hearings, which none of the parties has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainants belong to the Professional and higher categories of staff of WIPO and are participants in the United Nations Joint Staff Pension Fund. The pay of the Professional and higher categories of staff of WIPO, as of the other organisations that belong to the common system of the United Nations, may be increased by a "post adjustment" allowance calculated to ensure that it has the same purchasing power, whatever the duty station may be. Judgment 1457 (*in re* Di Palma and others) explained under 2 to 9 how post adjustment works.

What is known as the post adjustment index serves as a gauge of the cost of living at each duty station against the index for New York, which affords the standard of comparison for the whole common system. On 21 December 1989 the General Assembly of the United Nations adopted resolution 44/198. It thereby endorsed a recommendation by the ICSC for doing away with what had been called "regressivity" and for treating pension contributions as a "separate item" in the post adjustment index.

An old edition of the Commission's booklet "The Post Adjustment System – What is is, how it works" described "regressivity" in the following terms:

> "Post adjustment is not pensionable and is not a full compensation for total cost of living or exchange rate movement in a given location. The compensation covered by post adjustment varies from 4.1% for every 5% change in cost-of-living at the D.2 level to 4.5% for every 5% at P.1, with an average figure of 4.35% in the P.4 grade. Although currency fluctuations are immediately adjusted for, and at times may be implemented along with changes due to cost-of-living, as a general rule, a change of post adjustment is only effected when cost-of-living as measured by the post adjustment has moved a full 5% over its previous level.
>
> The amount of the adjustment is a percentage of net base salary, which varies with grade and step. For example, at P.1 step I it is 0.889% and at P.5 step V it is 0.852% for each 1% increase in the cost of living expressed in US$ terms. This decreasing rate is known as vertical regressivity and it accounts for three elements in the total picture of the Professional salary structure. First, it accounts for the fact that the pension contribution of a staff member (which is fixed in US$) is not included in the cost of living; every staff member, in fact, contributes 7 per cent of pensionable remuneration to the [United Nations Joint Staff] Pension Fund and this is not affected by the local cost of living. Secondly, the regression in the rates of compensation from the lower to the higher grades is based on the premise that the impact of higher costs is felt more severely by those with lower incomes than by those with higher incomes. Finally, it is an adjustment to net salary levels and therefore has to reflect the fact that other similar adjustments in a national context are usually based on gross income and thus are subject to progressive tax rates."

After consulting the Pension Fund the Commission worked out in July 1990 a method of giving effect to resolution 44/198. Whenever pension contributions went up the amount due in post adjustment was to go down by one-third of the increase. In time it emerged that that entailed "double-counting": not only was the post adjustment allowance being reduced but the deductions made from pay were being increased. So the staff were having to contribute more than their one-third share of total payments into the Fund.

Having noticed that its new method was having unintended and unwanted effects, the Commission decided at its 41st Session, which it held from 1 to 19 May 1995, that it would take account of "actual" pension contributions in the post adjustment index as from the date of "the next adjustment of the global scale of pensionable remuneration". That date was 1 November 1995.

By a circular of 18 July 1994, No. 41/1994, WIPO informed its staff of the post adjustment multiplier[*] it was applying to their pay for July 1994. By letters of 23 August 1994 the complainants asked the Director General to review their pay slips for July on the ground, among others, of miscalculation of the post adjustment. Having got no answer they went to the Appeal Board of WIPO on 7 November 1994. In its report of 23 May 1995 the Board recommended informing the Organization's "governing bodies" of the injury caused by counting pension contributions in working out the multiplier. It further recommended granting suitable means of redress as from August 1992. By a memorandum of 6 July 1995, the final decision that the complainants are impugning, the Director-General told them that he was rejecting the Board's recommendations.

B. The complainants object to the "double-counting" inherent in the method of reckoning post adjustment. Though they welcome the Commission's acknowledgment of what was wrong, they submit that it took too long to bring its method into line with the ban on "regressivity", with the rule that the staff pay one-third of pension contributions and the Organisation two-thirds, and with the principle of equal treatment of staff.

They ask the Tribunal to quash the decisions in their pay slips for July 1994 and order the Director General (1) to recalculate their pay for that month by the method that the Commission applied in November 1995 and make good the difference; (2) to do so for the preceding months from July 1991 and for the following months "starting with August 1994"; (3) to grant them compound interest at 10 per cent a year on the sums due; and (4) to award them 3,000 Swiss francs each in costs.

C. In submissions invited in accordance with Article 13(3) of the Tribunal's Rules and with the procedure set out in Judgment 1417, which was about the first complaint of Mrs. Damond and others, the Commission contends that the complainants are mistaken in claiming retroactive application of the new method. Post adjustment being a complex matter, it could not reasonably have been expected to detect and correct the flaw any sooner. In any event its decisions never apply retroactively: correcting the pay of some 18,000 serving and former officials retroactively would be "onerous and unreasonable".

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[*] For an explanation of the term "multiplier" see Judgment 1457 under A and 8.

Besides, the case law treats as irreceivable any claim made outside the time limit for appeal to the payment of sums due.

D. In its reply WIPO says that it may not challenge the Commission's methods. But it acknowledges the complainants' right to impugn any decision of the Organization's that they say is the outcome of an unlawful method. In WIPO's submission only claims to review of pay during the two years before the impugned decision are receivable.

E. In their rejoinder the complainants enlarge on their pleas and rebut remarks made by the Commission. They maintain that it could have corrected the flaw in the method in "days or at most weeks" and that its bad faith warrants retroactive redress.

F. In final submissions the Commission answers issues raised in the rejoinder which, it says, rest largely on misunderstanding of the system.

## CONSIDERATIONS

1. The complainants are challenging the amount of their pay for July 1994. They are pleading a flaw in the method that the International Civil Service Commission followed in taking account of their contributions to the United Nations Joint Staff Pension Fund in working out the post adjustment. Post adjustment is an allowance which depends on what is known as a multiplier. The multiplier is applied to the net base salary of staff so as to ensure that their earnings have the same purchasing power as those of staff of the United Nations stationed at New York. The Commission itself sets the methods of determining the post adjustment index.

2. Judgments 1457 (*in re* Di Palma, Mossaz and Zotin), 1458 (*in re* Damond, Pautasso and Royles), 1459 (*in re* Hoebreck, Schwarz and Yossifov) and 1460 (*in re* Derqué, Hansson No. 2, Ilardi, Makádi and Seinet) have already dealt with the reckoning of the "in-area", the "rental/housing" and the "out-of-area" components of the post adjustment index. Another item that counts in working out the index is the contributions that staff make to the Pension Fund and which are automatically deducted from monthly pay. They are a percentage of "pensionable remuneration", of which the scale is set out in an appendix to the Fund's Regulations. That percentage stands at 23.7, of which the Organization pays two-thirds and each participating staff member the remaining one-third.

3. Since rates of pensionable remuneration are the same at all duty stations, such expenditure by the staff on pension contributions requires special

treatment in the post adjustment system. Account must be taken, too, of the fact that from time to time — ordinarily once a year — the Commission adjusts the scale of pensionable remuneration for Professional and higher categories to take account of the weighted average of changes in net pay at New York. Over the years various methods have been proposed and followed for taking account of pension contributions in the index. Save an interval in 1987-88, for many years until July 1990 the method did not treat them as an item of expenditure. Instead, whenever changes in local costs amounted to a certain percentage, the index was adjusted by only a part of that percentage. The Commission made a comprehensive review of the system in 1989. In a report to the General Assembly of the United Nations it recommended treating pension contributions as a separate item in the index so as to avoid a shift from staff to organisation of the share of expenditure on pension contributions.

4. By resolution 44/198 of 21 December 1989 the General Assembly endorsed as from 1 July 1990 recommendations for removing what had been called "regressivity"[*] from the system and for including pension contributions as a separate item in the index. To give effect to that resolution the Commission decided that pension contributions should be included in the index with an appropriate weighting to be calculated separately for each duty station, but that their value would — to quote the Commission's own brief — "be frozen with an index of 100 in time-to-time updatings despite any increases that might occur in the level of pension contributions".

5. Yet by 1993 it appeared that the method was having what the Commission calls

> "the unintended effect of both reducing the post adjustment that staff members received by one-third of the amount of any increase in pension fund contributions while the deductions from salaries were also increased by the same amount; this meant that staff members in effect were charged twice the increase in any pension contributions, resulting in an over-all burden on them of somewhat over one-third of the total contributions paid by organizations and staff to the Pension Fund."

The secretariat of the Commission thereupon put the matter to the Advisory Committee on Post Adjustment Questions (ACPAQ). That Committee met in May 1993 and in its report to the Commission recommended removing the staff member's pension contributions altogether from the post adjustment index. The Commission debated that recommendation at its 38th Session, in July-August 1993. The upshot was that it asked the ACPAQ to show how its recommendation would affect "time-to-time adjustment" and "place-to-place comparison".

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[*] See A above.

6. The ACPAQ returned to the matter in May-June 1994 and came up with another solution. It recommended — in its own words —

> "effective with the next round of place-to-place surveys, the use of actual pension contributions in time-to-time adjustments of the post adjustment index so long as staff pension contributions remained at 7.9 per cent of pensionable remuneration."

The Commission took up the Advisory Committee's report at its 40th Session, in June-July 1994, but did not discuss it in detail because the text was not yet out in French. It came back to the matter at its 41st Session, in May 1995. It then approved in substance the new recommendation for including actual pension contributions in reckoning the index: the new method was to apply to the next adjustment, in November 1995, of the scale of pensionable remuneration.

7. The complainants are claiming recalculation of their pay for July 1994 by the method thus adopted for use as from November 1995. They also claim recalculation of their pay for the preceding months since July 1991 and for later months, starting in August 1994, and payment of the difference. They claim interest at the rate of 10 per cent a year and costs. The decision they are impugning is one the Director General took on 6 July 1995 not to recalculate staff pay for July 1994 or for the other months.

8. As was held in Judgment 1265 (*in re* Berlioz and others) under 22, staff may challenge the lawfulness of any measure taken by the Commission that serves as the basis for the decisions they are impugning. And the main issue these complaints raise is whether to make retroactive the revised method by which staff contributions to the Pension Fund were to be reckoned in the index as from November 1995, the date of adjustment of the scale of pensionable remuneration.

9. It is common ground that the method was technically flawed in that, as the Commission itself acknowledged in May 1993, it resulted in the "double-counting". But the complainants say that the Commission should not have made the mistake in the first place; that, having found the flaw, the secretariat should itself have made the correction instead of raising the matter with the ACPAQ and the Commission; that, failing that, the Commission ought to have seen the flaw — in particular that the index had not been quite purged of "regressivity" — after just a few instances of application; and that it should have made the correction by August or September 1993. To make

things worse, they go on, there were the two further delays, first in the referral of the matter to the ACPAQ and then in the Commission's failing to take it up at all because the French version was missing, so that it was not until May 1995 that the new method was adopted.

10. So the material issues are whether the flaw should not have occurred in the first place; whether, being discovered in May 1993, it should have been corrected by August or September 1993; whether the secretariat could itself have dealt with the matter without referring it to the ACPAQ and the Commission; and whether there was culpable delay by the Commission in changing the method.

11. Whereas the complainants make out that the method of taking account of pension contributions in the index is fairly simple, the Commission retorts that it is inherently complex, and it cites the papers which the secretariat put to the ACPAQ and the reports the ACPAQ in turn submitted. It points out that three years went by and no-one, not even the staff associations, detected the error; that once it was detected and analysed by statistical experts the solution the ACPAQ recommended had to go back for further consideration, and that the Advisory Committee thereupon changed its mind and recommended another. The Commission explains that the reason why the system is so complex a matter is that the situations it has to deal with are themselves complex. It has to ensure the equivalence of purchasing power at some two hundred duty stations, whatever the changes in the local cost of living or fluctuations in the value of the local currency against the United States dollar. Change is swift at some duty stations, at others slow; some local currencies rise against the dollar, others fall. At some duty stations the pension contribution amounts to over 12 per cent of take-home pay; at Geneva and others it comes to only five or six. The system must use a single set of formulas to take account of all such changes and fluctuations as well as the relative weighting of manifold items of expenditure. Such formulas cannot be simple. Adjusting them calls for much thought to ensure that "correction" does not have unintended and unwanted effects in some circumstances. As for pension contributions, the Commission says that an error may become apparent only after some years have gone by, since changes in pensionable remuneration come ordinarily but once a year and it is they that set off a new bout of calculations.

12. The Tribunal acknowledges that the method of counting pension contributions is anything but simple. Even the ACPAQ, the advisory body of experts, changed recommendations. The Tribunal further accepts that because

of the complexity of the matter the Commission could not have seen the flaw at the outset or even soon afterwards, and that when it did it at once set about finding a solution.

13. The Tribunal holds it unreasonable to suggest that the secretariat ought to have made the correction of its own accord. The secretariat has no authority to make such a radical change without consulting the ACPAQ and the Commission. Again, the complainants' plea is devoid of merit.

14. The examination of the matter by the ACPAQ and the Commission proved to be fraught with difficulty. They had to ensure that the burden of increases in pension contributions was shifted neither from staff to organisation nor from organisation to staff. Sending the matter back to the ACPAQ was necessary to shed light on the effects of the recommendation. In the event the recommendation was changed. It is true that there was unfortunate delay in 1994, when the Commission postponed its decision because the French text was not yet ready. It explains that that was due to lack of funds. No member of the Commission could be reasonably expected to take up such a technical subject without fully understanding the recommendation: any change in the method called for great care. There is no evidence to suggest any ulterior motive for the failure to provide the French text. The conclusion is that, all things considered, the Commission was not guilty of any culpable delay.

15. The Commission submits that it keeps various aspects of the common system under constant review. As it makes changes it may find afterwards that some prove to the benefit and some to the detriment of staff. It cites another decision it took in May 1995, to adjust the weighting of the "out-of-area" component of the index. That change was to go into effect as from 1 November 1995, and the delay was to the benefit of staff. If the Commission had taken earlier both that decision and the one at issue in this case staff stationed in Geneva would have suffered a net reduction in post adjustment as from that date.

16. Making a decision retroactive would require the calculation of the past pay of all the staff concerned, including those who have since left. The Commission's practice is to have its decisions take effect only in a few months' time so that the secretariat and the organisations may make the calculations. The Tribunal concludes that it is neither necessary nor even reasonable to require retroactive application of the revised method. A balance must be struck between many elements in working out the index. All the Commission can do is to keep them under review and, when defects do emerge, revise the method so as to make the correction reasonably soon.

Though the system will never be perfect, the Commission can correct flaws only as they appear.

17. Since the Commission's decisions were lawful no vicarious liability may be imputed to the defendant.

## DECISION

For the above reasons,

The complaints are dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Michel Gentot, Vice-President, and Miss Mella Carroll, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 30 January 1997.

Wm Douglas

WILLIAM DOUGLAS

Michel Gentot

MICHEL GENTOT

Mella Carroll

MELLA CARROLL

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

A.B. Gardner

A.B. GARDNER

# EIGHTY-SECOND SESSION

## ***In re* Heitz (No. 3)**

## **Judgment 1605**

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Mr. André Joseph Léon Heitz against the International Union for the Protection of New Varieties of Plants (UPOV) on 3 October 1995, the brief filed by the International Civil Service Commission (ICSC) on 30 January 1996, the Union's reply of 8 March, the complainant's rejoinder of 11 April, the Commission's comments thereon of 23 May and the letter of 1 July 1996 from the Secretary-General of UPOV informing the Registrar of the Tribunal that the Union did not wish to enter a surrejoinder;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Article 13, paragraph 3, of its Rules;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a Frenchman, is employed by the Union as a "director-counsellor" at grade D.1 and is a participant in the United Nations Joint Staff Pension Fund. The pay of the Professional and higher categories of staff of the Union as of the other organisations that belong to the common system of the United Nations, may be increased by a "post adjustment" allowance calculated to ensure that it has the same purchasing power, whatever the duty station may be. Judgment 1457 (in re Di Palma and others) explained under 2 to 9 how post adjustment works.

What is known as the post adjustment index serves as a gauge of the cost of living at each duty station against the index for New York, which affords the standard of comparison for the whole common system. On 21 December 1989 the General Assembly of the United Nations adopted resolution 44/198. It thereby endorsed a recommendation by the ICSC for doing away with what had been called "regressivity" and for treating pension contributions as a "separate item" in the post adjustment index.

An old edition of the Commission's booklet "The Post Adjustment System — What it is, how it works" described "regressivity" in the following terms:

> "Post adjustment is not pensionable and is not a full compensation for total cost of living or exchange rate movement in a given location. The compensation covered by post adjustment varies from 4.1% for every 5% change in cost-of-living at the D.2 level to 4.5% for every 5% at P.1, with an average figure of 4.35% in the P.4 grade. Although currency fluctuations are immediately adjusted for, and at times may be implemented along with changes due to cost-of-living, as a general rule, a change of post adjustment is only effected when cost-of-living as measured by the post adjustment has moved a full 5% over its previous level.
>
> The amount of the adjustment is a percentage of net base salary, which varies with grade and step. For example, at P.1 step I it is 0.889% and at P.5 step V it is 0.852% for each 1% increase in the cost of living expressed in US dollar terms. This decreasing rate is known as vertical regressivity, and it accounts for three elements in the total picture of he Professional salary structure. First, it accounts for the fact that the pension contribution of a staff member (which is fixed in US dollars) is not included in the cost of living; every staff member, in fact, contributes 7 per cent of pensionable remuneration to the Pension Fund and this is not affected by the local cost of living. Secondly, the regression in the rates of compensation from the lower to the higher grades is based on the premise that the impact of higher costs is felt more severely by those with lower incomes than by those with higher incomes. Finally, it is an adjustment to net salary levels and therefore has to reflect the fact that other similar adjustments in a national context are usually based on gross income and thus are subject to progressive tax rates."

After consulting the Pension Fund the Commission worked out in July 1990 a method of giving effect to resolution 44/198. Whenever pension contributions went up the amount due in post adjustment was to go down by one-third of the increase. In time it emerged that that entailed "double-counting": not only was the post adjustment allowance being reduced but the deductions made from pay were being increased. So the staff were having to contribute more than their one-third share of total payments into the Fund.

Having noticed that its new method was having unintended and unwanted effects, the Commission decided, at its 41st Session, which it held from 1 to 19 May 1995, that it would take account of "actual" pension contributions in the post adjustment index as from the date of "the next adjustment of the global scale of pensionable remuneration". That date was 1 November 1995.

The Staff Regulations of the World Intellectual Property Organization (WIPO) apply to the staff of the Union as well. By a circular of 18 July 1994, No. 41/1994, WIPO informed its own staff of the post adjustment multiplier* it was applying to their pay for July 1994. The same multiplier was to apply to the pay of UPOV's staff. By a letter of 23 August 1994 the complainant asked the Secretary-General of the Union to review his pay slip for July on the ground, among others, of miscalculation of the post adjustment. Having got no answer he went on 7 November 1994 to the Appeal Board of WIPO, to which the staff of the Union have access. In its report of 23 May 1995 the Board recommended informing the Union's "governing bodies" of the injury caused by counting pension contributions in working out the multiplier. It further recommended granting suitable means of redress as from August 1992. By a memorandum of 6 July 1995, the final decision that the complainant is impugning, the Secretary-General told him he was rejecting the Board's recommendations.

B. The complainant objects to the "double-counting" inherent in the method of reckoning post adjustment. Though he welcomes the Commission's acknowledgment of what was wrong, he submits that it took too long to bring its method into line with the ban on "regressivity", with the rule that the staff pay one-third of pension contributions and the Union two-thirds, and with the principle of equal treatment of staff.

He asks the Tribunal to quash the decision reflected in his pay slip for July 1994 and order the Secretary-General (1) to recalculate his pay for that month by the method the Commission applied in November 1995 and make good the difference; (2) to do so for the preceding months from July 1991 and for the following months "starting with August 1994"; (3) to grant him compound interest at 10 per cent a year on the sums due; and (4) to award him 3,000 Swiss francs in costs.

C. In submissions invited in accordance with Article 13(3) of the Tribunal's Rules and with the procedure set out in Judgment 1417 (*in re* Damond and others) the Commission contends that the complainant is mistaken in claiming retroactive application of the new method. Post adjustment being a complex matter, it could not reasonably have been expected to detect and correct the flaw any sooner. In any event its decisions never apply retroactively: correcting the pay of some 18,000 serving and former officials retroactively would be "onerous and unreasonable". Besides, the case law treats as irreceivable any claim madé outside the time limit for appeal to the payment of sums due.

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* For an explanation of the term "multiplier" see Judgment 1457 under A and 8.

D. In its reply UPOV says that it may not challenge the Commission's methods. But it acknowledges the complainant's right to impugn any decision of the Union's that he says is the outcome of an unlawful method. In the Union's submission only claims to review of pay during the two years before the impugned decision are receivable.

E. In his rejoinder the complainant enlarges on his pleas and rebuts remarks made by the Commission. He maintains that it could have corrected the flaw in the method in "days or at most weeks" and that its bad faith warrants retroactive redress.

F. In final submissions the Commission answers issues raised in the rejoinder which, it says, rest largely on misunderstanding of the system.

## CONSIDERATIONS

1. The complainant is challenging the amount of his pay for July 1994. He is pleading a flaw in the method that the International Civil Service Commission followed in taking account of his contributions to the United Nations Joint Staff Pension Fund in working out the post adjustment. Post adjustment is an allowance which depends on what is known as a multiplier. The multiplier is applied to the net base salary of staff so as to ensure that their earnings have the same purchasing power as those of staff of the United Nations stationed at New York. The Commission itself sets the methods of determining the post adjustment index.

2. Judgments 1457 (*in re* Di Palma, Mossaz and Zotin), 1458 (*in re* Damond, Pautasso and Royles), 1459 (*in re* Hoebreck, Schwarz and Yossifov) and 1460 (*in re* Derqué, Hansson No. 2, Ilardi, Makádi and Seinet) have already dealt with the reckoning of the "in-area", the "rental/housing" and the "out-of-area" components of the post adjustment index. Another item that counts in working out the index is the contributions that staff make to the Pension Fund and which are automatically deducted from monthly pay. They are a percentage of "pensionable remuneration", of which the scale is set out in an appendix to the Fund's Regulations. That percentage stands at 23.7, of which the Union pays two-thirds and each participating staff member the remaining one-third.

3. Since rates of pensionable remuneration are the same at all duty stations, such expenditure by the staff on pension contributions requires special

treatment in the post adjustment system. Account must be taken, too, of the fact that from time to time — ordinarily once a year — the Commission adjusts the scale of pensionable remuneration for Professional and higher categories to take account of the weighted average of changes in net pay at New York. Over the years various methods have been proposed and followed for taking account of pension contributions in the index. Save an interval in 1987-88, for many years until July 1990 the method did not treat them as an item of expenditure. Instead, whenever changes in local costs amounted to a certain percentage, the index was adjusted by only a part of that percentage. The Commission made a comprehensive review of the system in 1989. In a report to the General Assembly of the United Nations it recommended treating pension contributions as a separate item in the index so as to avoid a shift from staff to organisation of the share of expenditure on pension contributions.

4. By resolution 44/198 of 21 December 1989 the General Assembly endorsed as from 1 July 1990 recommendations for removing what had been called "regressivity"* from the system and for including pension contributions as a separate item in the index. To give effect to that resolution the Commission decided that pension contributions should be included in the index with an appropriate weighting to be calculated separately for each duty station, but that their value would — to quote the Commission's own brief — "be frozen with an index of 100 in time-to-time updatings despite any increases that might occur in the level of pension contributions".

5. Yet by 1993 it appeared that the method was having what the Commission calls

> "the unintended effect of both reducing the post adjustment that staff members received by one-third of the amount of any increase in pension fund contributions while the deductions from salaries were also increased by the same amount; this meant that staff members in effect were charged twice the increase in any pension contributions, resulting in an over-all burden on them of somewhat over one-third of the total contributions paid by organizations and staff to the Pension Fund."

The secretariat of the Commission thereupon put the matter to the Advisory Committee on Post Adjustment Questions (ACPAQ). That Committee met in May 1993 and in its report to the Commission recommended removing the staff member's pension contributions altogether from the post adjustment index. The Commission debated that recommendation at its 38th Session, in July-August 1993. The upshot was that it asked the ACPAQ to show how its recommendation would affect "time-to-time adjustment" and "place-to-place comparison".

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* See A above.

6. The ACPAQ returned to the matter in May-June 1994 and came up with another solution. It recommended — in its own words —

> "effective with the next round of place-to-place surveys, the use of actual pension contributions in time-to-time adjustments of the post adjustment index so long as staff pension contributions remained at 7.9 per cent of pensionable remuneration."

The Commission took up the Advisory Committee's report at its 40th Session, in June-July 1994, but did not discuss it in detail because the text was not yet out in French. It came back to the matter at its 41st Session, in May 1995. It then approved in substance the new recommendation for including actual pension contributions in reckoning the index: the new method was to apply to the next adjustment, in November 1995, of the scale of pensionable remuneration.

7. The complainant is claiming recalculation of his pay for July 1994 by the method thus adopted for use as from November 1995. He also claims recalculation of his pay for the preceding months since July 1991 and for later months, starting in August 1994, and payment of the difference. He claims interest at the rate of 10 per cent a year and costs. The decision he is impugning is one the Secretary-General took on 6 July 1995 not to recalculate staff pay for July 1994 or for the other months.

8. As was held in Judgment 1265 (*in re* Berlioz and others) under 22, staff may challenge the lawfulness of any measure taken by the Commission that serves as the basis for the decisions they are impugning. And the main issue this complaint raises is whether to make retroactive the revised method by which staff contributions to the Pension Fund were to be reckoned in the index as from November 1995, the date of adjustment of the scale of pensionable remuneration.

9. It is common ground that the method was technically flawed in that, as the Commission itself acknowledged in May 1993, it resulted in the "double-counting". But the complainant says that the Commission should not have made the mistake in the first place; that, having found the flaw, the secretariat should itself have made the correction instead of raising the matter with the ACPAQ and the Commission; that, failing that, the Commission ought to have seen the flaw — in particular that the index had not been quite purged of "regressivity" — after just a few instances of application; and that it should have made the correction by August or September 1993. To make things worse, he goes on, there were the two further delays, first in the referral

of the matter to the ACPAQ and then in the Commission's failing to take it up at all because the French version was missing, so that it was not until May 1995 that the new method was adopted.

10. So the material issues are whether the flaw should not have occurred in the first place; whether, being discovered in May 1993, it should have been corrected by August or September 1993; whether the secretariat could itself have dealt with the matter without referring it to the ACPAQ and the Commission; and whether there was culpable delay by the Commission in changing the method.

11. Whereas the complainant makes out that the method of taking account of pension contributions in the index is fairly simple, the Commission retorts that it is inherently complex, and it cites the papers which the secretariat put to the ACPAQ and the reports the ACPAQ in turn submitted. It points out that three years went by and no-one, not even the staff associations, detected the error; that once it was detected and analysed by statistical experts the solution the ACPAQ recommended had to go back for further consideration, and that the Advisory Committee thereupon changed its mind and recommended another. The Commission explains that the reason why the system is so complex a matter is that the situations it has to deal with are themselves complex. It has to ensure the equivalence of purchasing power at some two hundred duty stations, whatever the changes in the local cost of living or fluctuations in the value of the local currency against the United States dollar. Change is swift at some duty stations, at others slow; some local currencies rise against the dollar, others fall. At some duty stations the pension contribution amounts to over 12 per cent of take-home pay; at Geneva and others it comes to only five or six. The system must use a single set of formulas to take account of all such changes and fluctuations as well as the relative weighting of manifold items of expenditure. Such formulas cannot be simple. Adjusting them calls for much thought to ensure that "correction" does not have unintended and unwanted effects in some circumstances. As for pension contributions, the Commission says that an error may become apparent only after some years have gone by, since changes in pensionable remuneration come ordinarily but once a year and it is they that set off a new bout of calculations.

12. The Tribunal acknowledges that the method of counting pension contributions is anything but simple. Even the ACPAQ, the advisory body of experts, changed recommendations. The Tribunal further accepts that because of the complexity of the matter the Commission could not have seen the flaw

at the outset or even soon afterwards, and that when it did it at once set about finding a solution.

13. The Tribunal holds it unreasonable to suggest that the secretariat ought to have made the correction of its own accord. The secretariat has no authority to make such a radical change without consulting the ACPAQ and the Commission. Again, the complainant's plea is devoid of merit.

14. The examination of the matter by the ACPAQ and the Commission proved to be fraught with difficulty. They had to ensure that the burden of increases in pension contributions was shifted neither from staff to organisation nor from organisation to staff. Sending the matter back to the ACPAQ was necessary to shed light on the effects of the recommendation. In the event the recommendation was changed. It is true that there was unfortunate delay in 1994, when the Commission postponed its decision because the French text was not yet ready. It explains that that was due to lack of funds. No member of the Commission could be reasonably expected to take up such a technical subject without fully understanding the recommendation: any change in the method called for great care. There is no evidence to suggest any ulterior motive for the failure to provide the French text. The conclusion is that, all things considered, the Commission was not guilty of any culpable delay.

15. The Commission submits that it keeps various aspects of the common system under constant review. As it makes changes it may find afterwards that some prove to the benefit and some to the detriment of staff. It cites another decision it took in May 1995, to adjust the weighting of the "out-of-area" component of the index. That change was to go into effect as from 1 November 1995, and the delay was to the benefit of staff. If the Commission had taken earlier both that decision and the one at issue in this case staff stationed in Geneva would have suffered a net reduction in post adjustment as from that date.

16. Making a decision retroactive would require the calculation of the past pay of all the staff concerned, including those who have since left. The Commission's practice is to have its decisions take effect only in a few months' time so that the secretariat and the organisations may make the calculations. The Tribunal concludes that it is neither necessary nor even reasonable to require retroactive application of the revised method. A balance must be struck between many elements in working out the index. All the Commission can do is to keep them under review and, when defects do emerge, revise the method so as to make the correction reasonably soon.

Though the system will never be perfect, the Commission can correct flaws only as they appear.

17. Since the Commission's decisions were lawful no vicarious liability may be imputed to the defendant.

## DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Michel Gentot, Vice-President, and Miss Mella Carroll, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 30 January 1997.

Wm Douglas

**WILLIAM DOUGLAS**

**MICHEL GENTOT**

Mella Carroll

**MELLA CARROLL**

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
* GENEVA *

A.B. Gardner

**A.B. GARDNER**

## EIGHTY-SECOND SESSION

***In re* Fish** **Judgment 1606**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Maurice Fish against the International Labour Organization (ILO) on 4 December 1995 and corrected on 30 January 1996, the ILO's reply of 2 April, the complainant's rejoinder of 11 May and the Organization's surrejoinder of 9 July 1996;

Considering Article II, paragraph 1, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a British subject born in 1932, joined the staff of the International Labour Office in 1972. His duties included advising on the procurement of supplies for field projects. His last contract was to expire at 31 May 1991.

On 1 June 1984, while he was on duty in Pakistan, the motorcar he was driving was hit broadside by a bus and he suffered multiple injury. The Organization treated the accident as service-incurred and as entitling him to compensation under Annex II to the Staff Regulations, which is headed "Compensation in event of illness, injury or death attributable to the performance of official duties".

By a minute of 25 October 1990 he told the secretary of the Compensation Committee that he intended to take early retirement at the end of the year and was claiming compensation for the continuous partial invalidity he was suffering from because of the accident. By a letter of 9 April 1991 the secretary informed him that he would get a lump-sum award of 4,734.24 United States dollars in compensation for permanent loss of function, which the Organization's medical officer had assessed at 4 per cent. By a letter of 26 August 1994 the chief of the Personnel Administration Section told him that, his condition having worsened since 1990, the permanent loss of function was recognised as having increased to 6 per cent and that he was to get another $5,748.60 in compensation.

By a letter of 12 September 1994 his solicitors informed the chief of Personnel Administration that he was willing to accept the ILO's offer but was pressing a claim to compensation for loss of earning capacity.

In a letter dated one year later to the very day, the chief of Personnel Administration told him that the Director-General had rejected his claim for want of any evidence of impairment of his "professional ability". That is the decision he is impugning.

B. The complainant submits that the impugned decision is flawed, the Director-General having overlooked medical evidence that his inability to work as an international project adviser had lowered his earning capacity to "nil".

He seeks the quashing of the challenged decision, the grant of an invalidity pension and an award of £2,076.70 sterling in costs.

C. In its reply the ILO contends that the complaint is devoid of merit. In its submission the medical evidence does not suggest that the complainant is unfit to carry on his "normal" or an equivalent occupation. Besides, how could an ailment or injury affect the earning capacity of a pensioner of 64, who would have "little chance of obtaining employment" anyway, even if in perfect health? The Organization is liable only for salary lost on account of impairment of the complainant's health, the burden being on him to prove that his earnings have suffered. But he does not even suggest how much he should get by way of invalidity pension.

D. In his rejoinder the complainant says he need not put a figure on the amount he is claiming. As to the medical evidence, the Director-General had a duty to get hold of all the material information before taking a decision; if he fails to discharge that duty the Tribunal may order a medical enquiry at the Organization's expense. The ILO's "ageist" attitude towards the complainant's prospects of employment does not square with recent demand for such experienced international consultants.

E. In its surrejoinder the Organization presses its pleas. In answer to the charge of "ageism" it observes that the general rule in the ILO is not to employ retired people.

## CONSIDERATIONS

1. The ILO recruited the complainant in 1972. He served on field projects, mainly as an adviser on the procurement of supplies. In 1984, while on duty as an official at grade P.4 in Pakistan, he sustained injury in a motor accident. By a minute of 25 October 1990 he informed the secretary of the ILO's Compensation Committee that he had suffered "Since this accident a loss of muscle and subsequent constraints of activities with [his] left arm", that he intended to take early retirement at the end of that year and that he was filing a formal claim to "compensation for continuous partial invalidity".

2. The secretary replied on 9 April 1991 that "the ILO Medical Advisor assessed the rate of the permanent loss of function resulting from [his] accident at 4% of the whole man" and that under Annex II to the ILO Staff Regulations, which governs compensation, that assessment entitled him to lump-sum compensation of 4,734.24 United States dollars. That figure was 4 per cent of twice the amount of yearly pensionable remuneration at step 5 in grade P.4 as at the date of the accident.

3. The material provisions of Annex II read:

> "9. In case of continuing partial invalidity affecting the professional ability of an official who does not remain in the service of the Office, the official shall be entitled to such proportion of the pension provided for in paragraph 8 as corresponds to the degree of his invalidity.
>
> 10. The degree of invalidity shall be assessed on the basis of medical evidence and in relation to loss of earning capacity in the official's normal occupation or an equivalent occupation appropriate to his qualifications and experience.
>
> ...
>
> 12. Regardless of whether the official returns to duty in the Office, or in the United Nations or another specialized agency, or not and of whether there is continuing invalidity which affects the official's earning capacity or not, an official shall be entitled to lump-sum compensation for permanent disfigurement or permanent loss of a member or function. The amount of such compensation shall be assessed on the basis of medical evidence and in relation to loss of enjoyment of life, by reference to a guide approved by the Director-General."

4. In a letter of 20 May 1991 to the ILO the complainant said that he wished to appeal. The protracted correspondence that ensued between his solicitors and the Organization shed light on the grounds of appeal. In reply to his solicitors' question as to why the ILO had applied paragraph 12 of Annex II, instead of 9, the secretary of the Compensation Committee told them in a letter of 5 February 1992:

> "In view of the presumption that the relatively small impairment suffered affected enjoyment of life rather than professional ability, compensation was awarded under paragraph 12 only."

After further medical examinations and reports the complainant filed notice of appeal on 5 March 1993 seeking reassessment of the degree of his continuing partial invalidity at 10 per cent. Contending that the degenerative changes attributable to the accident would continue to affect him and had severely handicapped him in his social and domestic life "and also in his working environment", he claimed the award of an invalidity pension under paragraph 9 of Annex II.

5. To enable the Compensation Committee to assess the degree of his invalidity in accordance with paragraph 10 its secretary asked his solicitors in a letter of 6 May 1993 "to provide such evidence as [they considered] necessary for a determination concerning the possible loss of earning capacity". Their letter of 24 May replied that he wished -

> "to claim for loss of amenities, due to his injury sustained in Pakistan in 1984. This has affected his ability to paint, garden, decorate and also his sporting hobby of playing golf."

The secretary pointed out — quite rightly — that such a claim came under paragraph 12, which was about "loss of enjoyment of life", rather than 9, which was about "partial invalidity affecting professional ability".

6. There were two more medical reports after further examinations of the complainant. One report, dated 7 September 1993, was by an orthopaedic surgeon whom he had consulted at Darlington, in England. It recorded "aching in his neck after sitting in one position for a period i.e. reading" or "when undertaking repetitive actions above shoulder level i.e. painting ceilings"; "stiffness of his neck"; "aching radiating down the left upper limb with certain activities"; a "feeling of weakness in the left arm"; and "aching in the left arm when carrying objects in the left hand". The consultant's findings were restrictions in neck movements — flexion, extension and rotation — "apparent wasting of the left biceps" and "gross degenerative change" in one section of the cervical spine. Though he did express the definite opinion that the symptoms had been caused by the accident in 1984 he said nothing of incapacity or impairment of function or of the effects on enjoyment of life, occupational skills and earning capacity.

7. The second report, dated 17 March 1994, was by a consultant neurologist in London whom the Organization itself had appointed to examine the complainant. From the description the report gives the symptoms and changes seem less severe: "mild difficulty" in using the left arm, for example for gardening and playing golf; "discomfort" in that arm when lifting suitcases

and driving long distances; somewhat restricted movements of the neck, though not "outside the normal limits (which are wide) for a man of [the complainant's] age"; and a "troublesome" degree of stiffness in the neck, "particularly when travelling, (flying etc.)". There was "evidence of a left C7 [cervical] root lesion", but it had "clearly been present many years", even before 1984, though the accident had undoubtedly "exacerbated" the condition. Though there was "spondylitic change" it was "nothing very extraordinary for a man of his age". The consultant's report concluded "from the standpoint of his disability pension" that there was impairment of the motor function of the left arm and sensory impairment; that they accounted for "a total of 10% impairment of upper extremity"; and that the loss of function corresponded to "6% of impairment of the whole person".

8. In a letter of 26 August 1994 the chief of the Personnel Administration Section informed the complainant that the Director-General had decided, on the Compensation Committee's recommendation, to increase the award under paragraph 12 of Annex II from 4 to 6 per cent of the relevant figure, and to reject the claim made under paragraph 9 to payment of benefits for continuing partial disability for want of evidence of loss of earning capacity. In a letter of 12 September 1994 to the chief of Personnel Administration the complainant's solicitors stated that he was not challenging the first part of that decision but wanted reconsideration of his claim under paragraph 9:

> "The condition of which our client complains forced our client to take early retirement in 1990 since the complaint would not allow the extensive travel required in his position as an Adviser. Our client's knowledge and skills are in the field of Project Advice and management internationally. Our client lives in North Yorkshire, England. There is, realistically, no prospect of him obtaining employment which would allow him to utilise his skills without him having to travel extensively. Our client's medical condition prevents him from so travelling.
>
> ... This partial invalidity of our client continues and we cannot foresee our client being able to obtain meaningful employment, given his age, medical condition, and location of living."

9. The Director-General's decision rejecting that claim was conveyed in a letter of 12 September 1995 from the chief of Personnel Administration. The Director-General noted, said the letter, that the complainant had not alleged when taking early retirement that the reason was that his condition barred extensive travel and that he had no prospect of obtaining employment. Not only was there no evidence to support the assertion but the ILO had

offered him a short-term contract in 1991 and he himself had applied for a position in the Organization in 1993. The Director-General's view was that "the evidence produced to support the claim of impairment of professional ability and loss of earning capacity" was "manifestly insufficient".

10. The complainant is asking the Tribunal to quash that decision on the grounds that "it is manifestly unfair and ignores the medical evidence submitted to date". In his rejoinder he contends that because the loss of function has been assessed at 6 per cent — and the rate of his disability "appears ... to be increasing" — there must be "equivalent" loss of earning capacity. He argues that if the evidence obtained in the internal proceedings was insufficient the Tribunal should quash the decision founded thereon and order further inquiry — as indeed it did in Judgments 141 (*in re* Miele), 875 (*in re* Muiga) and 1373 (*in re* Kogelmann) — to ascertain whether further payments are due to him.

11. The complainant's case is that his earning capacity has been impaired, not directly, but merely indirectly in that travel is essential for any employment for which he is suited and his condition has made it difficult, if not impossible, for him to travel. The burden therefore lay on him in the internal proceedings to show that any suitable employment would entail an appreciable amount of travel. As the Director-General observed in the text of the impugned final decision, the complainant did not take that position when asking for early retirement. And even though the secretary of the Compensation Committee was helpful enough to point out the lack of evidence in support of a claim under paragraph 9, he still did not offer any. Indeed, before the ILO took the decision of 26 August 1994 referred to in 8 above, all that he had ventured on that score was that he would be severely handicapped "in his working environment". Even the statements that his solicitors made thereafter amounted to no more than an unsupported assertion that, living in Yorkshire, he had no prospect of obtaining employment that would not require him to "travel extensively".

12. The conclusion from the foregoing is that the impugned decision did not ignore any medical or other evidence and was not — as the complainant puts it — "manifestly unfair". Though the Tribunal has indeed ordered further inquiry in some cases, it did so because the medical evidence before it was inadequate — which in any event it is not in this case — and where the inadequacy of such evidence was not attributable to any lapse on the

complainant's part. Here the evidence that was lacking was of the need for the complainant to travel for the purposes of any suitable employment. That was a matter that fell within his own knowledge. Yet he neglected to offer such evidence, though given every opportunity to do so. So the Tribunal will not order any further inquiry.

13. The conclusion from the foregoing is that the complainant's claims must fail in their entirety.

## DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 30 January 1997.

Wm Douglas

WILLIAM DOUGLAS

Mella Carroll

MELLA CARROLL

MARK FERNANDO

INTERNATIONAL LABOUR ORGANISATION ADMINISTRATIVE TRIBUNAL GENEVA

A.B. Gardner

A.B. GARDNER

***Registry's translation,
the French text alone
being authoritative.***

## EIGHTY-SECOND SESSION

***In re* Carretti (Nos. 8 and 9)** **Judgment 1607**

THE ADMINISTRATIVE TRIBUNAL,

Considering the eighth and ninth complaints filed by Miss Giuliana Carretti against the Food and Agriculture Organization of the United Nations (FAO) on 11 April 1996, the FAO's replies of 22 and 23 July, the complainant's rejoinders of 12 September and the Organization's surrejoinders of 25 October 1996;

Considering Articles II, paragraph 5, and VII, paragraph 1, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Facts relevant to the present disputes are set out under A in Judgment 1360 of 13 July 1994 on Miss Carretti's fifth complaint. As that judgment said, the FAO dismissed her on the grounds of unsatisfactory performance by a decision from the Director of the Personnel Division which she got on 20 April 1993. The Tribunal dismissed her fifth complaint as irreceivable because she had not exhausted her internal remedies.

By a letter of 25 November 1993 to the chief of the Personnel Policy and Entitlements Service the complainant objected to the reckoning of her terminal entitlements which that Service had notified to her in a letter of 28 September. On 14 December 1993 the chief of the Service answered that the FAO was not changing the reckoning.

By a letter of 19 November 1994 she appealed to the Director-General under paragraph 331.4 of the FAO Manual asking him to reverse the dismissal of 20 April 1993 and a warning she had got on 22 December 1992; she also made claims about end-of-service "entitlements and their reckoning". In a letter of 21 December 1994 the Assistant Director-General in charge of Administration and Finance told her that the Director-General had rejected her appeal as time-barred. On 7 February 1995 she went to the Appeals Committee. In its report of 25 October 1995 the Committee recommended rejection for failure to observe the time limit. By a letter of 8 January 1996, which she impugns, the Director-General told her he was endorsing the Committee's recommendation.

B. The complainant submits that her complaints are receivable. In her eighth one she says she lodged her appeal of 19 November 1994 within ninety days of receiving the text of Judgment 1360 so as to get a "final decision" about her dismissal from the Director-General. The Appeals Committee should have taken up her case on the merits under Staff Rule 303.1322, which reads:

> "... If any time limit prescribed in Staff Rules 303.1311 and 303.1314 has not been met, the Committee shall not, except insofar as provided otherwise in the FAO Manual, enter into the merits of the case."

Rule 302.3171 says that "The right of a staff member to claim any allowance, grant or payment existing but unpaid, shall lapse two years after the date on which the entitlement arose". The whole point of her writing to the Director of Personnel on 19 May 1995 and 30 March 1996 was to "stop the time limit".

On the merits of her eighth complaint she argues that her dismissal was unlawful and wrongful. The Director of Personnel utterly disregarded praise of her in testimonials from her first-level supervisors. Under Manual paragraph 308.416 an official may be dismissed only if poorly rated in the two consecutive reporting periods in which he may earn a salary increment. Under Staff Regulation 301.091 the Director had no authority to dismiss her. Her dismissal and the written warning of 22 December 1992 showed procedural flaws. The text dated 20 April 1993 recommending dismissal is insulting and at odds with the terms of the warning. She was promised a permanent job. Her dismissal constitutes misuse of authority. The FAO infringed the provisions of Manual paragraphs 308.411 and 308.4112 on the grant of within-grade increments.

In her ninth complaint she cites provisions of the Manual and precepts embodied in the legislation and case law of several countries.

In both complaints she seeks the quashing of the decision of 8 January 1996.

In the eighth one she asks the Tribunal to quash also the decision of 20 April 1993 that dismissed her for unsatisfactory performance, the recommendation of dismissal of even date and the warning of 22 December 1992. She wants all those texts and the relevant correspondence to be removed from her personal file. She seeks (1) an award of 25,000 Swiss francs in moral damages; (2) material damages for loss of employment and payment of earnings from the date of separation up to the end of the month in which judgment is delivered, plus reinstatement in her pension entitlements as from 27 May 1993 to 30 April 1996; (3) her two years' pay as from the date of judgment in lieu of reinstatement; (4) the grant of step XI in grade G.5 as from 1 June 1993 for service from 1 June 1991 to 31 May 1993, plus interest to be reckoned at the rate of 10 per cent a year and end-of-service entitlements reckoned accordingly; and (5) 10,000 francs in costs.

In her ninth complaint she asks the Tribunal to order the FAO (1) to discharge the obligations it incurred in giving her notice on 20 April 1993, viz. (a) to set the date of separation at 31 July 1993, (b) set the period of notice from 1 August to 31 October 1993 and pay her compensation accordingly and (c) treat 31 October 1993 as the last day of her appointment; (2) pay her 15 months' severance pay; (3) pay her for sick leave from 21 July to 31 July 1993; (4) declare Manual paragraphs 314.413 and 314.72 to be inconsistent; (5) determine whether she may contribute to the pension fund on account of the payment due to her under 1(b) above; (6) refund 278,586 lire she paid into the Van Breda health insurance scheme from 1 August to 31 October 1993; (7) pay her eight-and-a-half days' annual leave accrued from 21 July to 31 October 1993; (8) reckon her end-of-service benefit as for the period from 12 April 1976 to 31 October 1993; (9) grant her end-of-service benefit at the rate of 1/13.5 for the four months from 1 July to 31 October 1993; (10) give her an "accurate" certificate of employment instead of the one dated 21 December 1994; (11) pay her interest at the rate of 10 per cent a year as from 1 August 1993 on the sums due to her in lieu of notice and by way of compensation for dismissal and sick leave, health insurance payments, annual leave and end-of-service entitlements; (12) pay her 15,000 Swiss francs in moral damages and (13) award her 5,000 francs in costs.

C. In its replies the FAO challenges the receivability of both complaints. It says that the complainant has tried to get new decisions so as to set off new time limits.

In its reply to her ninth complaint it asks the Tribunal to join the two complaints.

D. In the rejoinder on her eighth complaint she says it was "in pursuance of Judgment 1360" that she appealed to the Director-General on 19 November 1994 and to the Appeals Committee on 7 February 1995. Her intention was not to get a new decision about her dismissal from the Director-General, who had not taken the original one: it was the Director of Personnel who took the decision of 20 April 1993. The only final decision by the Director-General was the one of 8 January 1996. She maintains that the Appeals Committee had a duty to take up her appeal on the merits.

She observes in the rejoinder on her ninth complaint that it does not raise the same issue of receivability as her eighth since Staff Rule 302.3171 covers the amounts she is claiming. She is opposed to joinder.

E. In its surrejoinders the FAO contends that she failed to make a timely challenge to the decision of 20 April 1993 and that the letter of 8 January 1996 contained no new challengeable decision.

## CONSIDERATIONS

1. Facts with a bearing on these cases are recounted under 1 to 5 in Judgment 1360 of 13 July 1994. In that judgment the Tribunal dismissed Miss Carretti's fifth complaint as irreceivable on the grounds that she had failed to exhaust her internal remedies as Article VII(1) of its Statute required.

2. The dispute arises out of the decision of dismissal that the Director of the Personnel Division notified to her on 20 April 1993. On 19 November 1994 she appealed to the Director-General seeking reversal of the decision and payment of her end-of-service entitlements in full. By a letter dated 21 December 1994 the Assistant Director-General in charge of Administration and Finance replied on the Director-General's behalf that under Rule 303.1311 she was too late to challenge the decision of 20 April 1993. She went to the Appeals Committee on 7 February 1995. In a brief dated 24 May she cited a letter of 19 May 1995 in which the Director of Personnel had told her that any claim she might make to payments was not yet time-barred under Rule 302.3171. In its report of 25 October 1995 the Committee recommended rejecting her appeal as irreceivable. The Director-General endorsed its recommendation in a decision of 8 January 1996.

3. Since both complaints challenge that decision and raise the same issues of fact and law they will be joined to form the subject of a single judgment.

4. The FAO submits that they are irreceivable on the grounds of the complainant's failure to exhaust her internal remedies. It observes that the facts go back to the period from 1981 to 1993, when she and the Organization were at loggerheads, and culminated in its decision of 20 April 1993 to dismiss her for unsatisfactory performance. Several episodes of the dispute have already prompted seven complaints from Miss Carretti. In the fifth, which she filed on

8 July 1993, she asked the Tribunal to quash her dismissal. Judgment 1360 of 13 July 1994 declared that complaint irreceivable on the grounds that she had failed to exhaust her internal remedies.

5. In its submissions in reply to the complaints the FAO submits that her appeal of 19 November 1994 to the Director-General was out of time; so held the Appeals Committee, and on its recommendation the Director-General rejected her appeal in the decision of 8 January 1996 which she is impugning.

6. The defendant's plea is sound. In her eighth complaint the complainant's main claim is to the quashing of her dismissal dated 20 April 1993 and of the warning of 22 December 1992. As the Tribunal has often said, the rule in Article VII(1) of its Statute about exhaustion of the internal means of redress requires that the internal appeal procedure be not just followed, but properly followed, and in particular that any internal time limits be observed. Staff Rule 303.1311 says that someone who wants to appeal must write to the Director-General "within 90 days from the date of receipt of the decision impugned". Having got notice of the decision on 21 April 1993, the complainant was free until 20 July to appeal. That holds good, too, for her challenge to the warning of 22 December 1992. Since she did not act until 19 November 1994, long after the time limit had run out, she failed to exhaust her internal remedies under the Staff Rules and to get a final decision, the only sort challengeable under Article VII(1) of the Tribunal's Statute. Her eighth complaint is therefore irreceivable.

7. In her ninth complaint she says that her purpose in citing Rule 302.3171 is to show that her claim to end-of-service entitlements is not time-barred.

8. She is wrong. It was in a letter dated 14 December 1993 that the FAO gave her notice of the rejection of her financial claims. So her appeal of 19 November 1994 to the Director-General seeking reversal of the decision of 14 December 1993 was lodged after expiry of the ninety-day time limit in Rule 303.1311. So for the same reasons as those stated under 6 above her ninth complaint is irreceivable: she has failed to exhaust her internal remedies.

9. Since both her complaints are irreceivable, her claims fail in their entirety.

## DECISION

For the above reasons,

The complaints are dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Edilbert Razafindralambo, Judge, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 30 January 1997.

*(Signed)*

WILLIAM DOUGLAS E. RAZAFINDRALAMBO EGLI

A.B. GARDNER

# EIGHTY-SECOND SESSION

***In re* Molloy (No. 3)** **Judgment 1608**

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Mr. Brian Michael Molloy against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 21 October 1995 and corrected on 24 November, Eurocontrol's reply of 26 January 1996, the complainant's rejoinder of 5 April and the Agency's surrejoinder of 14 June 1996;

Considering Articles II, paragraph 5, and VII, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, who is British, joined the staff of Eurocontrol in 1968. He is employed as a senior technical assistant, first class, at grade B2 in its Experimental Centre at Brétigny-sur-Orge, in France.

In a minute of 29 November 1994 to the President of the Permanent Commission of Eurocontrol he accused Eurocontrol of "penny-pinching" over the "recommissioning of the canteen" and suggested other ways of saving money. He sent a copy of the minute to the President of the International Air Transport Association (IATA) and senior officers inside the Agency.

On 21 December the Director of the Centre gave him a reprimand under Articles 88 and 89 of the Staff Regulations for behaviour "incompatible with his status as a Eurocontrol official". By a minute dated 18 January 1995 the complainant asked the Director General to have the reprimand withdrawn. In a letter of 27 February the Director of Personnel said that he was answering his internal "complaint" of 18 January on behalf of the Director General, who had decided to uphold the reprimand.

In a minute of 30 March 1995, which the complainant described as a "complaint following Article 92(2)", he asked the Director General to confirm the decision in the letter of 27 February. By a letter of 10 May the Director of Personnel told him he was putting the matter to the Joint Committee for Disputes. In its report of 17 July 1995 the Committee recommended rejecting the appeal and by a letter dated 28 July the Director of Personnel informed him that the Director General had endorsed its recommendation. That is the challenged decision.

B. The complainant submits that the reprimand was unwarranted: he had neither infringed any rule nor communicated with "unauthorised" people. Since the letter of 28 July 1995 was the first decision to bear the Director General's signature it was the challengeable one.

He wants the Tribunal to quash the reprimand and award him damages for injury to his career.

C. In its reply Eurocontrol contends that the complaint is irreceivable because he filed it more than 90 days after getting the decision of 27 February 1995, which the Director of Personnel signed "For the Director General and by delegation".

In subsidiary argument on the merits it describes his behaviour as "morally reprehensible" and in breach of his duty of loyalty and discretion under Articles 12 and 17 of the Staff Regulations.

D. In his rejoinder the complainant presses his pleas.

E. In its surrejoinder the Agency maintains the arguments in its reply.

## CONSIDERATIONS

1. The Organisation employs the complainant as a senior technical assistant, first class, at grade B2 in its Experimental Centre. The background to the dispute is that in drawing up its budget for 1995 it deleted appropriations for restoring a canteen at the Centre. The local section of the Staff Committee, of which the complainant is a member, criticised that decision but declined to endorse the text of a letter he had drafted for despatch to the Permanent Commission, Eurocontrol's governing body. Acting independently, and without going through official channels, he addressed a memorandum dated 29 November 1994 to the President of the Permanent Commission and copies of it to the President

of the Committee of Management, the Chairman of the Budgetary and Financial Working Group, the President of the International Air Transport Association, the Director General and the Director of the Centre. In his memorandum he expressed the opinion that the Organisation's "penny-pinching" would prove counterproductive and he suggested other ways of saving money.

2. On 21 December 1994 the Director of the Centre issued a reprimand to the complainant in pursuance of Articles 88 and 89 of the Staff Regulations. In a minute dated 18 January 1995 to the Director General the complainant said that under Article 21 of the Staff Regulations every employee had a duty, as he put it, to "assist and advise his hierarchical superiors". He maintained that in writing to a higher authority he had been carrying out "a statutorily defined act". He pointed out that where a complaint concerned a "hierarchical superior" Article 92(3) authorised submission of it "to the next higher authority". He suggested that the Director General should instruct the Director of the Centre to withdraw the reprimand. But the reply sent by the Director of Personnel on 27 February 1995 on the Director General's behalf was that the reprimand was fully justified and was maintained.

3. On 30 March 1995 the complainant wrote asking the Director General to confirm the conclusion in the Director's letter of 27 February. On 10 May the Director of Personnel answered, acknowledging receipt of the minute of 30 March 1995 and treating it as a "complaint" under the Staff Regulations. The matter was referred to the Joint Committee for Disputes and, acting on its advice, the Director General dismissed the complainant's claims on 28 July 1995. He filed this complaint on 21 October 1995.

4. He submits that it was reasonable for him to communicate with the highest authority in the Organisation once the Administration had refused dialogue with the accredited representatives of the staff. He is mistaken. Article 21 of the Staff Regulations, which he relies on, is about the responsibility of a staff member for the performance of the duties assigned to him and his duty to "assist and tender advice to his superiors". The "duties" meant are those to be performed by the staff member as such and the "superiors" are senior officers of the Administration of Eurocontrol. As for Article 92(3), which he also refers to, it deals with internal appeals and is irrelevant to the material issue.

5. The complainant had two obligations. First, he had to observe the hierarchical channels of communication if he wanted to refer a matter to the Organisation's decision-making bodies. Secondly, Article 17 of the Regulations required him to exercise discretion in the use of information that came to his knowledge in the course of duty. Since he acted in breach of both of those obligations the reprimand was fully justified. His complaint will therefore be dismissed in its entirety.

6. Since the complaint fails on the merits there is no need to rule on the Organisation's objections to receivability.

## DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Michel Gentot, Vice-President, and Mr. Edilbert Razafindralambo, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 30 January 1997.

W Douglas

WILLIAM DOUGLAS

MICHEL GENTOT

E. RAZAFINDRALAMBO

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

AB Gardner

A.B. GARDNER

Organisation internationale du Travail International Labour Organization
*Tribunal administratif* *Administrative Tribunal*

*Registry's translation,*
*the French text alone*
*being authoritative.*

# EIGHTY-SECOND SESSION

***In re*** **Abreu de Oliveira Souza (Nos. 1 and 2), Bastos de Miranda, Ribeiro (Nos. 1 and 2), Fonseca Prates (Nos. 1 and 2), Marques Porto e Santos (Nos. 1 and 2), Mendes Fernandes Levi (Nos. 1 and 2), Queiroz Dias (Nos. 1 and 2) and Silva Martins (Nos. 1 and 2)**

**Judgment 1609**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Mrs. Josélia Abreu de Oliveira Souza, Mrs. Adriana Bastos de Miranda Ribeiro, Mrs. Márcia Maria Fonseca Prates, Mrs. Lilian P. Marques Porto e Santos, Miss Sonia Teixeira Mendes Fernandes Levi, Mrs. Rosana de Queiroz Dias and Mrs. Bernardeth de Fátima Silva Martins against the International Labour Organization (ILO) on 20 October 1994 and corrected on 17 January 1996, their second complaints filed against the Organization on 21 March 1995 and corrected on 17 January 1996, the ILO's replies of 24 May, the complainant's rejoinders of 9 August and the Organization's surrejoinders of 24 October 1996;

Considering Articles II, paragraph 1, VII and VIII of the Statute of the Tribunal and Article 14 of its Rules;

Having examined the written submissions and decided not to order hearings, which none of the parties has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainants, who are Brazilian, were serving at the material time on the staff of the ILO's office at Brasilia. Mr. Wilson Vieira dos Santos had become director of the office in April 1991.

By a single letter of 10 May 1994 the complainants submitted a collective "complaint" to the Director-General of the International Labour Office through the Director of the Personnel Department. They alleged that Mr. Vieira dos Santos had infringed the rules on proper administration and on behaviour at work: he had been indulging in coarse lewd talk and disrespectful and demeaning behaviour, taking decisions arbitrarily and meddling in his subordinates' private lives. They asked the Director-General to take fitting action and to afford them protection pending a final decision.

By a letter dated 16 June 1994 the Director of Personnel told Mrs. Silva Martins, who was acting *de facto* for the other complainants as well, that their letter of 10 May was not a valid "complaint" under Article 13.2 of the Staff Regulations; each must file her own one under that provision; if they sent off 13.2 complaints within seven working days of receipt of the letter the ILO would take the date of filing as 26 May, when their letter of 10 May had reached headquarters in Geneva; and after determining the material facts and looking into them the Administration would let them have a decision and they might challenge it within six months of seeing the text.

On 28 June 1994 they each submitted 13.2 complaints to the Director-General. They pleaded that Mr. Vieira dos Santos had offended against the rules that govern management and relations at work in his treatment of subordinates — cruel and violent behaviour and obscene language — and in his wielding of authority — refusal of annual or sick leave and intrusion into private life. Some of the complainants further accused him of misusing his authority, discriminating against them on the grounds of creed or bodily handicap, meddling in staff union matters and ignoring proper administrative channels. They asked the Director-General to take disciplinary action against him for the harm to their health and affront to their dignity. Three of them demanded his summary dismissal.

Although they had asked the ILO not to let him see their grievances, it did so and invited him to comment. In a letter of 27 June 1994 to the Director of Personnel he rebutted their charges, which he set down to resentment at the firm hand he had had to take in running the Brasilia office.

From a fax message the Director of Personnel sent on 8 July 1994 the complainants learned that headquarters were sending officials out to Brasilia on a fact-finding mission and had had to let Mr. Vieira dos Santos see their grievances so that he might have his say. There followed correspondence between them and the Director about how the ILO would be protecting them.

The fact-finding mission reported on 20 September 1994. They recommended, among other things, that the Administration should impose condign punishment on Mr. Vieira dos Santos for the serious offences they found him guilty of; tell those who reported on his performance how he had been running the Brasilia office; have him make a formal apology to the staff there for wanting in due respect; pay back to the complainants the costs they had incurred for treatment by group therapy and the costs of their 13.2 complaints; and see to it that such things never happened again.

On 27 September the complainants each sent the Director-General letters asking him to treat their 13.2 complaints of 28 June as individual requests for the writing of letters of apology, to be given the widest circulation inside the Organization, for breach of its duty to respect their dignity. They each sought awards equivalent to five years' pay in material and moral damages and awards against the medical and legal costs that the behaviour of Mr. Vieira dos Santos had caused them to incur. Mrs. Abreu de Oliveira Souza further sought the quashing of a report that he had written on 12 July 1993 about her performance and of a decision of 9 November 1992 and another of 17 December 1993, each to extend her appointment by only one year.

On 20 October 1994 they lodged complaints with the Tribunal challenging the implied rejection of their 13.2 complaints dated 28 June 1994 but deemed to have been filed on 26 May 1994.

On 19 December 1994 Mr. Vieira dos Santos wrote them identical letters: he said, among other things, that he had resigned and had intended merely to do his job, not to offend them.

By letters of 21 December 1994 the Director of Personnel told them that the Director-General would pay their legal costs against written evidence of payment; they were free under Annex II of the Staff Regulations to claim the refund of their medical expenses; the Director-General had ordered Mr. Vieira dos Santos to make them "appropriate" apologies; and disciplinary action had been taken against him "independently" of their claims. The Director's letter to Mrs. Abreu de Oliveira Souza said that the sole reason for the one-year extensions of her appointment had been financial straits, and that the deputy director of the Brasilia office would see her about rewriting the report on her performance.

On 21 March 1995 the seven lodged second complaints with the Tribunal against the Director-General's decisions of 21 December 1994.

In like-worded letters of 10 April 1995 the Director-General told them that Mr. Vieira dos Santos' treatment of them was "not tolerated in the Organization and would not have subsisted for so long if it had promptly been brought to [his] attention".

B. The complainants object to the approach that the mission took: their report discounted any factual evidence that Mr. Vieira dos Santos might challenge and, time and again, took his tale at face value instead of setting the different versions against each other so as to get to the bottom of things. Yet even the findings of fact and the recommendations in that report ought to have induced the Organization to award in full the relief the complainants were claiming.

The ILO was in breach of its duty to care for their dignity. So much was plain from Mr. Vieira dos Santos' treatment of them and the torpor of the Director-General, who cared more about giving him his say than about taking the steps urgently called for and who refused to offer them apologies on the ILO's behalf. As was said in Judgment 1376 (*in re* Mussnig), an international organisation has a special duty to act in cases of sexual harassment. This was one. Yet the ILO dilly-dallied: it took two-and-a-half years just to put out a circular, No. 543 of 2 November 1995, headed "Sexual harassment policy and procedures", which promised: "In view of the sensitive nature of sexual harassment, special procedures are being developed".

Mrs. Abreu de Oliveira Souza further alleges that the Director-General's decision of 21 December 1994 was flawed in that it came to wrong conclusions on the evidence and disclosed bias by refusing to overturn Mr. Vieira dos Santos' decisions of 9 November 1992 and 17 December 1993 to grant her one-year extensions of appointment. She sees personal prejudice too in the poor report that Mr. Vieira dos Santos signed on 12 July 1993 about her performance from 1 November 1990 to 31 October 1992.

The first complaints seek the quashing of the Director-General's implied rejection of the 13.2 complaints and awards of costs; the second complaints claim the quashing of the Director-General's decisions of 21 December 1994 and again costs.

C. The ILO replies that the first complaints are irreceivable *ratione temporis* because not until 27 September 1994 did the complainants explain the thrust of their 13.2 complaints. If what they said in their letters of that date is discounted, the first complaints are irreceivable *ratione materiae* too.

The ILO puts forward three reasons why the second complaints are irreceivable. First, some of the evidence the complainants have produced did not come into being until long after the date of filing of the complaint forms and they are relying on what happened after that date. So the complaints are not just "corrected" versions of the ones originally filed but new ones. Secondly, the complainants changed their claims in the course of the internal proceedings: the claims in their letters of 27 September are quite different from the ones they made in their 13.2 complaints. And thirdly, they have failed to exhaust their internal remedies: they challenged neither the final refusal on procedural grounds to entertain their 13.2 complaints "as clarified" nor the decision which the Director-General took of his own accord on the fact-finding mission's report on the merits, and which was not final.

In any event, should the Tribunal reject those pleas, their claims — which the ILO has met anyway — to disciplinary action against Mr. Vieira dos Santos and to the writing and circulation of letters of apology are irreceivable *ratione materiae*. Their claims to medical and legal expenses are misconceived inasmuch as they have failed to act on the ILO's offers of payment.

Since the complainants do not take the point, the ILO reserves the right to comment on another issue: can it be held liable for injury attributable, not to any particular decision or act of mismanagement, but to a staff member's wayward behaviour outside the context of his duties? The answer is, it submits, that it would be liable only for failure to "afford proper safeguards" against such behaviour or to "apply them with due diligence".

The complainants offer scant evidence in support of their allegations of injury: they exaggerate what happened and portray Mr. Vieira dos Santos as the embodiment of evil. They allege sexual harassment, for example; yet the facts scarcely bear out the charge and certainly do not suggest that there was any such harassment as the law construes the term. There was never any question of witting tolerance of what the complainants had reported to headquarters. The ILO took the matter in earnest from the outset, but before deciding what to do it had to get to the truth of the charges without detriment to the rights of either side. It nevertheless decided at once to keep Mr. Vieira dos Santos away from the office at

Brasilia by relieving him of his duties there as from 19 July 1994. It also treated the offences he was found guilty of as grave enough to warrant proceedings for dismissal. But he forestalled them by tendering his resignation and the Director-General accepted it as from 31 December 1994, one condition being that he write the complainants letters of apology.

The ILO says that it has granted the relief they seek. They have already had apologies in the letters of 10 April 1995 from the Director-General. Their claims to damages are time-barred and go well beyond what they asked for "while the iron was still hot".

Mrs. Abreu de Oliveira Souza's more particular grievances are devoid of merit: she is still on the staff and the decisions she objects to have harmed her career not a whit. The deputy director of the Brasilia office has rewritten the report on her performance at the material time.

D. The complainants rejoin that the one and only purpose of their first complaints is to safeguard their rights. Though the ILO warned them that their collective 13.2 complaint of 10 May 1994 was irreceivable it said nothing at the time of treating their claims therein as irreceivable *ratione materiae*.

They corrected their second complaints within the time limit set for correction in keeping with the Tribunal's own Rules: what held up correction was negotiation with the ILO. Their counsel having advised that the claims in their original 13.2 complaint were irreceivable, they duly worked out a new wording, still on the strength of the same facts, before the ILO came up with its answer. In any case, even if their letter of 27 September amounted to a new 13.2 complaint their second complaints would be receivable, having been filed with the Tribunal within the prescribed ninety days of the date of receipt of the Director-General's decisions in the Director of Personnel's letters of 21 December 1994. The complainants see as "artificial" the distinction the ILO tries to draw between a final decision on procedure and the interim one on the merits which it says was in those letters. Appeal lies to the Tribunal against the ILO's reply, whatever form it may take, to a 13.2 complaint.

The complainants again accuse the Organization of bias: instead of "seeking to protect them" it made Mr. Vieira dos Santos out to be the victim of the whole business.

They point out that circular 543 defines sexual harassment to include "verbal or non-verbal conduct which creates a sexually offensive working environment".

Citing the case law, they submit that the ILO is wrong to construe so narrowly its own liability for the behaviour of its staff. A firm line of precedent has it — they contend — that an organisation may be liable for the consequences of the way in which an official performs his duties, even when the injury is not attributable to an *intra vires* administrative decision. At all events the ILO fails to show that — to quote its own language — it "afforded proper safeguards" or applied them "with due diligence". It imposed no disciplinary sanction on Mr. Vieira dos Santos and even ruled it out by accepting his resignation. Though the Director-General's letters of 10 April 1995 purport to amount to an "apology" they do nothing of the kind: they offer no excuse, either from the ILO or from himself, for the treatment of them by Mr. Vieira dos Santos and by the Organization.

The complainants contend that the Tribunal is competent under Article VIII of its Statute to order specific performance of a duty. That may, for example, include the writing of a letter of apology to be circulated among all the staff.

E. In its surrejoinder the ILO presses its objections to receivability. The Director of Personnel's letters of 16 June 1994 to the complainants were plain enough: the Director-General would himself be taking a decision, whether or not they each lodged 13.2 complaints. His decision was notified in the letters of 21 December 1994 from the Director of Personnel, and it was subject to internal appeal.

The defendant again denies ignoring the complainants' interests and cites the correspondence with the Director of Personnel as evidence of its good faith.

Contrary to what they make out, the case law they cite suggests rather that an organisation is not liable for any injury caused by the irrational behaviour of one of its employees outside the line of duty.

They misread Article VIII of the Tribunal's Statute: the Tribunal may do no more than order an organisation to perform an obligation arising under a contract of employment. All that the complainants have asked for is the quashing of decisions. They cite no duty the ILO may have to offer them apologies; so their claims to letters of apology are irreceivable. Besides, the Organization has already granted them whatever satisfaction they may "reasonably" seek on that score.

## CONSIDERATIONS

1. All seven complainants were at the material time serving on the staff of the International Labour Office and stationed at the ILO's office at Brasilia. They were answerable to Mr. Wilson Vieira dos Santos, who had been made director of that office in 1991. In 1993 they twice protested at their working conditions in the office and at the director's behaviour. On 10 May 1994 they sent the Director of the Personnel Department a collective letter objecting to their supervisor's treatment of them, citing as examples insulting and offensive remarks, various forms of abasement and intrusion into private life and breach of the rules of proper conduct. They concluded by appealing to the Director-General for protection and for the sort of formal action that they believed to be urgently needed, and they cited Article 13.2 of the Staff Regulations, which reads:

> "Any complaint by an official that he has been treated inconsistently with the provisions of these Regulations, or with the terms of his contract of employment, or that he has been subjected to unjustifiable or unfair treatment by a superior official shall, except as may be otherwise provided in these Regulations, be addressed to the Director-General through the official's responsible chief and through the Personnel Department, within six months of the treatment complained of."

2. In a letter of 16 June 1994 the Director of Personnel answered that the ILO was taking their grievances seriously and would do whatever it had to. But — she went on — their letter of 10 May 1994 was not to be treated as a 13.2 complaint; instead they might each file such complaints, duly substantiated, which if despatched within seven days of receipt of the letter of 16 June the ILO would treat as filed on 26 May 1994, when it had got their letter of 10 May. At all events — said the Director — it would take a decision once it had ascertained the facts and they would be free to lodge new 13.2 complaints within six months of having notice of that decision.

3. On 28 June 1994 each of the seven lodged her own 13.2 complaint. Each of them set out in detail her grievances against a supervisor who, she said, had harassed and demeaned her and in general behaved without proper respect and in breach of the standards of labour law. Each of them asked the ILO to punish him and, pleading injury to dignity and health, reserved the right to go to the Tribunal.

4. Headquarters officials were sent out to the Brasilia office and from 12 to 20 July 1994 carried out an inquiry there. The mood was strained. On 19 July the ILO told Mr. Vieira dos Santos not to report for

duty until 8 August, when he was transferred to Geneva. The officials reported to the ILO on 20 September on their mission. After sifting the evidence they had heard they upheld many of the charges. They held that the conduct of Mr. Vieira dos Santos warranted disciplinary action commensurate with the gravity of what he had done, that he owed the staff at Brasilia formal apologies, and that the Organization should pay any medical and other expenses his behaviour had caused them. There were also findings about some complainants' more particular grievances.

5. There followed a great deal of correspondence between Personnel and the complainants, whom the staff union were backing. Worth mentioning are letters of 27 September 1994 whereby the complainants sought to "circumscribe" their 13.2 complaints of 28 June 1994 by expressly demanding letters of apology, the equivalent of five years' pay each in damages and the refund of medical expenses. Mrs. Abreu de Oliveira Souza asked also for the quashing of a performance report and of decisions of 9 November 1992 and 17 December 1993 to grant her only one-year extensions of appointment.

6. On 21 December 1994 the Director of Personnel wrote to each of the complainants to explain what action the Director-General would be taking on their 13.2 complaints. Her letters acknowledged that the evidence obtained by the fact-finding mission sufficed to bear out their charges: by his behaviour, attitude and language Mr. Vieira dos Santos had indeed harmed their personal and professional dignity. Though the ILO was rejecting some of their claims as irreceivable or devoid of merit, it had brought disciplinary proceedings against him on the grounds that his "authoritarian and arrogant attitude", to which it ascribed the "stressful and unhealthy working environment", was "incompatible with his status as an international civil servant"; the disciplinary proceedings were not, however, being brought because of the 13.2 complaints. The Director's letters went on to describe just what action the ILO was taking on those complaints: it would pay them back the cost of their paperwork and would, against evidence of payment, meet claims to the costs of any medical treatment they had had to undergo because of what they had been through. The Director-General — said the letter — much regretted the way that Mr. Vieira dos Santos had treated his staff; was ordering him to make them proper apologies; and impressed on them that "such treatment is not tolerated in the Organization and would not have subsisted for so long if it had been promptly brought to his attention". Lastly, the Director told

Mrs. Abreu de Oliveira Souza that her performance report would be rewritten.

7. On 20 October 1994 the seven of them had lodged first complaints with the Tribunal, impugning what they took to be implied rejection of their 13.2 complaints of 28 June 1994, treated by the ILO as filed on 26 May. On 21 March 1995 they lodged with the Tribunal in summary form second complaints, which they corrected on 17 January 1996, impugning the decisions of 21 December 1994 outlined in 6 above.

8. The fourteen complaints raise like issues, even though the facts of some may call for specific rulings, and are therefore joined to form the subject of a single judgment.

9. The defendant pleads that the complaints are irreceivable on several counts. It submits that the first complaints, purporting as they do to impugn implied decisions, are irreceivable on the grounds that the only specific relief sought in the original 13.2 complaints was disciplinary action against Mr. Vieira dos Santos. Their second complaints, challenging the decisions of 21 December 1994, must be deemed to have been filed only on 17 January 1996, the date of correction, long past expiry of the time limit of ninety days in the Tribunal's Statute. What is more, their claims shifted in the course of the internal proceedings, not being the same in their letters of 28 June 1994 as in their purportedly "explanatory" letters of 27 September 1994. Lastly, they failed to challenge the Director-General's decisions of 21 December 1994 as required by Article 13.2 and within the time limit it sets; so their complaints impugning those decisions are again irreceivable on account of their failure to exhaust their internal remedies.

10. Those pleas fail. The complainants' many claims were intricately linked, and the position kept changing. The defendant needed time in which to investigate their charges and, quite properly, the Director of Personnel sent them provisional replies in the meantime. So it is wrong to accuse the complainants of acting prematurely by filing suit on 20 October 1994: their purpose in doing so was to avoid the risk of being declared out of time. It is also wrong to take them to task for treating the letters of 21 December 1994 as final decisions rejecting their 13.2 complaints. After all, those letters purport to answer theirs of 10 May, 28 June and 27 September 1994. Though the Director of Personnel warns that their letters do not "offer an adequate basis for a decision" and explains that the Director-General has taken his decision "independently" of the 13.2

complaints, the letters constantly cite them and indeed in so many words reject several claims as irreceivable or devoid of merit. In the circumstances the complainants were free to treat the Director's letters as final decisions rejecting their 13.2 complaints, and appeal then lay to the Tribunal. And though they corrected their second complaints more than ninety days after getting notice of the decisions, they did not act out of time on that account. They filed in time with the Tribunal complaint forms identifying the decisions they were impugning; their counsel duly applied for extensions of the time limit for correction; and those extensions were duly granted under Article 14 of the Tribunal's Rules. The conclusion is that, even though their claims may have altered from the filing of their first to the filing of their second complaints, what is before the Tribunal is a single and duly delimited dispute and they may seek the quashing of the Director-General's final decisions as notified in the letters of 21 December 1994.

11. The Tribunal comes now to the merits. The case strikingly illustrates how deeply a supervisor may disrupt the lives of subordinates by dictatorial behaviour and indulgence in coarse language. The defendant is of course quite right in pleading that some claims of the complainants are of a kind that the Tribunal will not entertain. One is to the imposition of a disciplinary penalty on Mr. Vieira dos Santos: the reason why it cannot succeed is that, though the ILO did bring proceedings against him for dismissal, it was unfortunately unable to carry them through because he resigned. Unsuccessful too are the claims to the refund of legal costs of internal proceedings and medical expenses. The Director-General has actually granted those claims in the impugned decisions, albeit *ex gratia*. The claims to the writing of letters of apology likewise fail. Though the letters, supposedly of "apology", that Mr. Vieira dos Santos sent them at the ILO's bidding were quite inadequate, the closing passages of the letters of 21 December 1994 may be deemed to give them satisfaction on that score.

12. The only claims that do raise difficulty are to awards of damages for the behaviour of Mr. Vieira dos Santos.

13. The complainants observe that the ILO's refusal to pay compensation — beyond medical expenses actually incurred — rested on the report of the fact-finding mission and they contend that the report was incomplete and tendentious. On that score they are again mistaken. It is quite plain from the report that the officials sent out by headquarters were at great pains to investigate the many facets of the case and did not by any

means, as the complainants make out, take Mr. Vieira dos Santos' account on trust.

14. More telling is their plea that on the strength of the mission's findings the ILO should have granted them full damages and come more promptly to their rescue, and that in any event it was liable for the affront that the behaviour of one of its senior officers had caused to their dignity.

15. On one issue the Organization is right and the complainants are wrong: it was not laggard in dealing with the case. Though they had had talks in May 1993 with the ILO's auditor and in November 1993 with the chief of Administrative Services for its Regional Office for Latin America and the Caribbean, they stated no specific claim and there was not yet sufficient cause for action by the Organization. But as soon as they had put in their collective complaint the ILO sent off the fact-finding mission and, even before the mission was over, forbade Mr. Vieira dos Santos to report for duty. As for the disciplinary proceedings against him, he had resigned soon after transfer to headquarters and they no longer served any purpose. Nor may the ILO be held liable for his sending quite inadequate letters, supposedly of "apology", to the complainants.

16. Yet one issue remains: an international organisation is liable for the injury a staff member may cause in the performance of duty, and that includes injury to other members of staff. The defendant itself puts the question clearly enough:

> "How far may the Tribunal, acting *proprio motu*, hold an organisation liable for the injury that one staff member's misconduct may cause another when that injury is not attributable to any decision — be it lawful or not — or to mismanagement but to irrational behaviour extraneous by its very nature to the performance of duty such as, say, an act of violence, or sexual harassment, or theft?"

An organisation will of course not be liable for private misconduct of an employee that has no link with the performance of duty. But misconduct in the context of employment is another matter. When someone whom the organisation has appointed to act as supervisor or director commits an abuse of authority, the subordinate who suffers injury thereby is entitled to damages. Such is the complainants' case. Without having to go through all the evidence before it — the salient facts are summed up in A above — the Tribunal holds that each of the complainants suffered treatment that was an affront to her personal and professional dignity. It was inadmissible for one of its officers, in this case a man, to make a habit of addressing women subordinates in language that was blatantly coarse and lascivious.

What is more it offended against ILO circular 543 of 2 November 1995, which seeks to ensure — to use its own words — "a safe and healthful working environment free from sexual harassment and intimidation". The whole drift of the evidence before the Tribunal is that someone on whom the ILO had conferred much authority saw rough language and rough behaviour as not incompatible with his exercise of it. They were therefore part and parcel of the performance of his duties, and on that account the Organization is liable.

17. The ILO has already granted or offered the complainants compensation for material injury that strikes the Tribunal as fair. What sums, then, are they to be awarded in moral damages? Their claims under that head are grossly inflated. As subordinates they all suffered injury to dignity, even though it took different forms. In the circumstances the Tribunal awards each of them moral damages in an amount that it sets *ex aequo et bono* at 10,000 United States dollars.

18. Mrs. Abreu de Oliveira Souza has claims of her own to the quashing of decisions of 9 November 1992 and 17 December 1993 granting her only one-year extensions of appointment. The ILO has objections to the receivability of those claims. There being no need to entertain those objections, the Tribunal dismisses the claims on the merits. It is satisfied on the evidence that the decisions were not taken on any grounds extraneous to the Organization's interests and have not proved detrimental to her career. The defendant points out that she is still on the staff and, in keeping with the findings of the enquiry, it has revised her performance report. Her plea of misuse of authority fails.

19. The complainants are entitled to costs, and the amount is set at a total of 50,000 French francs.

## DECISION

For the above reasons,

1. The ILO shall pay each of the complainants 10,000 United States dollars in damages.
2. It shall pay them a single award of 50,000 French francs in costs.
3. Their other claims are dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Michel Gentot, Vice-President, and Miss Mella Carroll, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 30 January 1997.

*(Signed)*

WILLIAM DOUGLAS MICHEL GENTOT MELLA CARROLL

A.B. GARDNER

*Registry's translation,
the French text alone
being authoritative.*

## EIGHTY-SECOND SESSION

**_In re_ del Valle Franco Fernandez** **Judgment 1610**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs. Ana del Valle Franco Fernandez against the Customs Co-operation Council (CCC) on 7 October 1995, the Council's reply of 31 January 1996, the complainant's rejoinder of 17 May and the Council's surrejoinder of 19 September 1996;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written evidence and disallowed the complainant's application for hearings;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. On 23 June 1989 the Council issued a notice of vacancy for a post of technical officer at grade A3 in the Valuations Directorate. The notice said that the appointment would be for five years but extension was possible up to ten.

The complainant, who is Argentinian, was appointed to the post on 29 January 1990. In July 1991 the Government of the Argentine released her on administrative leave without pay. After two years in its employ the Council put her on a post as public relations officer.

At its 1993 and 1994 sessions the Council discussed a proposal by the Secretary General to reform the secretariat and change policy on the reappointment of technical officers. One of his proposals was to make a single five-year appointment the rule for staff in category A, which included the complainant, reserving extension for exceptional cases and limiting it to two years.

On 30 March 1994 the complainant asked the Director of Valuation to extend her appointment by five years. In a minute dated 12 July the Secretary General told her he would extend it by 12 months, to 28 January 1996.

By a letter of 7 October she asked the Secretary General to refer the matter to the Appeals Board under Staff Regulation 29. She said she was objecting to the refusal of a five-year extension and alleged that failure to consult the Administration Committee was at odds with the procedure laid down in staff circular 187 and Staff Rule 9.1. She applied for but was refused leave to be represented by counsel in the internal proceedings. In a report dated 2 June 1995 the Board recommended that the Secretary General should consult the Committee. By a minute of 4 July 1995 the chairman of the Appeals Board told the Secretary General that, in the light of the information that the Secretary General had given, he gathered that there had been such consultation.

In a letter of 10 July 1995, the impugned decision, the Secretary General confirmed that the complainant's appointment would not be extended beyond 28 January 1996.

B. The complainant pleads procedural and substantive flaws.

She charges the Council with failing to account properly for the decision: either it gave no reasons at all or else it gave them, in merely general and formal terms, after the decision had become irrevocable.

It acted in breach of staff circular 187. Staff Rule 9.1, under which the circular was issued, requires the Secretary General to consult the Administration Committee before deciding whether to allow an official's application for extension of appointment.

She alleges breach of her right to be represented by counsel for the purposes of her internal appeal. Neither Rule 29.2(d) nor paragraph 8 of staff circular 197, which says that appellants may be assisted by another staff member, bars representation by counsel.

In her submission there was breach of Rule 31.3, too, which requires the Secretary General to consult the Staff Committee on "any question of a general nature affecting the interests of the staff or arising out of the Staff Regulations and Staff Rules". Though the new policy that the Secretary General was proposing for reappointment met both those conditions, he had failed to consult the Staff Committee.

On the merits she contends that the Secretary General failed to apply binding decisions that the Council had taken at its session of June 1994 on reform of the secretariat and on the new policy of reappointment.

He committed an obvious mistake in assessing her performance. The reason that he eventually gave for the decision, namely that her work was not good enough to warrant extension by five years, was at odds with the views held by senior officers of the Council and by the Government of the Argentine.

The decision offended against the Council's long-standing and legally binding custom of granting a second five-year appointment to nearly everyone who wanted it provided that the government department approved.

There was breach of equal treatment. The Council has decided not to apply to serving officials a new policy limiting the reappointment of directors. Technical officers like the complainant are entitled to the same sort of treatment.

Lastly, she pleads misuse of authority: the real reason why the Secretary General refused to extend her appointment was that he intended to assign her duties to the head of his own office and allot the funds used to finance her post to one for his special assistant.

She asks the Tribunal to set aside the decision of 10 July 1995 and grant her material damages in an amount equivalent to the sums she would have earned in salary and allowances had her appointment been extended by five years, plus interest to be reckoned at the rate of 10 per cent a year as from the date at which the amounts fell due. She claims 250,000 Belgian francs in moral damages and the same amount in costs.

C. In its reply the CCC rebuts each of her pleas.

It says that it gave her the reasons for non-renewal on 11 July 1994 and on several later occasions orally or in writing. For one thing, the Council had decided as a matter of consistent policy not to reappoint technical officers for five years; for another, the quality of her performance did not warrant an exception.

The Staff Committee, which knew of the Secretary General's proposals, had expressed its views to him when the proposals for change were being mooted. So there was no point in consulting it formally.

Even though consistent practice is not to consult the Administration Committee about the reappointment of staff, the Secretary General did consult it about the complainant's case.

Neither custom nor the rules allow representation by counsel in internal appeal proceedings.

There was no misuse of authority. Though the Council transferred the complainant from one unit to another, she kept her post, so that the transfer released no budgetary funds. It was a former Secretary General who transferred her, and he never had any intention of creating a post for someone to head his own office.

The complainant, a technical officer, may not benefit from rules that apply to directors. So there was no breach of equal treatment.

Technical officers have no right to extension of appointment. The practice that the complainant is relying on is not long-standing and not as broad as she makes out. Debates in the Council in June 1994 disclosed no disagreement with the Secretary General's proposals. The impugned decision is quite in keeping with the wishes of the Council, which gave its approval to the "five-year" rule even though it trusted that the Administration would not apply it too strictly to serving staff. That is why the Secretary General came to extend the complainant's appointment by only one year.

A report by her former first-level supervisor makes it plain that her performance was poor.

Since she is no longer in the service of the Government of the Argentine — as the Council has learned only from her complaint — it would have been wrong anyway to extend her appointment further.

D. In her rejoinder the complainant enlarges on her pleas.

She denies concealing her administrative status. There is no rule that requires a technical officer to be on secondment from a government department or even a civil servant in the home country.

She raises to 500,000 Belgian francs the amount she seeks in moral damages.

E. In its surrejoinder the Council presses its pleas.

The material issue is not whether she was still a member of the civil service of her home country but whether she was a customs official. That is the basis of recruitment of technical officers. The complainant no longer met that requirement when she applied for reappointment.

## CONSIDERATIONS

1. The Customs Co-operation Council (CCC) was set up in 1952 and employs some 120 staff headed by a Secretary General. The complainant joined its staff on 30 January 1990 under a five-year fixed-term appointment as a technical officer at grade A3.

2. On 30 March 1994 she applied for a five-year extension of appointment. At the time the Secretary General was drawing up a new policy for the renewal of staff contracts. A report dated 29 April 1994 by an *ad hoc* working party went to the Policy Commission and to the Council in June

1994. The Secretary General proposed tightening policy for the renewal of the fixed-term appointments of technical officers, one change being to limit to five years the length of new appointments. Subject to transitional measures the proposals went through.

3. By a minute of 12 July 1994 the Secretary General accordingly told the complainant that he was intending to extend her appointment by only one year, to 28 January 1996. In another application for extension she said she wanted to put her case herself to the Administration Committee. The Secretary General answered her on 1 September 1994 that since she wanted time to make arrangements for her family to go back to the Argentine he was confirming his offer of only twelve months' extension. In a letter of 7 October 1994 to the Secretary General she acknowledged his offer, pressed her claim to a hearing by the Committee and asked him to put her case to the Appeals Board.

4. The Secretary General refused her leave to speak to the Committee. Before he had got a report from the Appeals Board he wrote her a letter dated 7 February 1995 again offering, with the agreement of the Argentine Government department, to grant her the extension to 28 January 1996. He also promoted her to grade A4 as senior technical officer. She submitted a brief to the Appeals Board on 29 March 1995. In his reply of 21 April 1995 thereto the Secretary General explained his decision by reference to the terms of her appointment and to the Staff Regulations and Staff Rules. In a "confidential" minute of 11 May 1995 to the Board he said that he had discussed the matter of renewal of her appointment with the members of the Administration Committee. He added that, as he had already told her in a conversation in 1994, the quality of her work did not warrant renewal. In a report dated 2 June 1995 the Appeals Board concluded that the Secretary General still had to seek formal advice from the Committee. He did so on 23 June 1995. In a minute of 4 July 1995 to the Secretary General the chairman of the Appeals Board said that, that being so, the case was closed and the Secretary General had only to take his final decision. By a letter of 10 July 1995 the Secretary General informed the complainant that he was confirming his earlier decision. That is the decision she is impugning.

5. Though the Secretary General enjoys broad discretion over extension, his exercise of it is still subject to review. The Tribunal will indeed set his decision aside if it was taken *ultra vires* or in breach of a formal or procedural rule, or if there was a mistake of fact or of law, or if some material fact was neglected or a plainly wrong conclusion is drawn from the evidence, or there was misuse of authority. Here indeed the complainant is pleading several such flaws.

6. She submits that the Secretary General failed to state reasons for his "decision" of 12 July 1994; that, that "decision" being irrevocable, the later one of 1 September 1994, which offered reasons that were merely formal and general in character, did not remove the flaw; and that the minute of 21 April 1995 that the Secretary General put to the Appeals Committee showed the same flaw.

7. The Tribunal is satisfied on the evidence that there is no merit in the plea. For one thing, there was not, as the complainant contends, anything "irrevocable" about the minute of 12 July 1994. It contains no decision at all, let alone a final one, since it merely tells her that the Secretary General will not be extending her appointment by more than a year. His minute of 1 September 1994 may not be treated as a decision either: it simply confirms his offer of a reappointment of only 12 months and asks her to say whether she accepts. At all events there were two reasons for his offer of the twelve-month extension: one was his commitment to stricter application of the material rules and the other his wish to make an exception and, as she had asked, let her have time to make arrangements for her family's return to the Argentine. Being expressly related to the complainant's own circumstances, those reasons were neither formal nor general.

8. In a "confidential" minute of 11 May 1995 in answer to the complainant's comments on his reply to her internal appeal the Secretary General remarked that though he had agreed to extend her appointment by one year "the quality of her work did not merit a renewal" at all; and though his earlier letters had not said so he told her so in the course of a conversation in 1994 when he had warned her he was not minded to grant her any extension whatever. The Tribunal sees no reason to question that statement.

9. The conclusion is that the complainant was sufficiently informed of the Secretary General's reasons for letting her have only another year and so was able to argue her case. Moreover, as is said in 17 and 18 below, she had the opportunity of answering the unfavourable appraisal of her work. The plea fails.

10. She pleads several breaches of due process, the first being that the Secretary General failed to consult the Administration Committee properly: no report by the Committee was entered in the case records and in any event the Secretary General did not consult it before taking his decision of 12 July 1994.

11. That plea too fails. It is true that circular 187 requires under (c) that the "Secretary General will consult the official's Director and the official's home Administration before deciding, after seeking the advice of the

Administration Committee, whether the official should be reappointed". As was said in 7 above, however, the Secretary General's minutes of 12 July and 1 September 1994 did not amount to decisions to reappoint her: they simply state his willingness to extend her appointment by one year and invite her to say whether she accepts. The actual decision did not come until he wrote her his letter of 7 February 1995, "with the agreement", as he put it, "of your home Administration". And it is plain from the minutes of the Administration Committee's meeting of 23 June 1995 that the Committee had been consulted on 24 November 1994 and had then given an opinion on the complainant's reappointment. So the formal requirement of consultation was met before the Secretary General took his decision of 7 February 1995.

12. The complainant further objects to breach of her right to be assisted or represented by counsel in the internal appeal proceedings. But she is mistaken. Staff Rule 29.2(d), on the procedure before the Appeals Board, says that "the appellant may be represented or assisted by any member of the Secretariat". In refusing the complainant's application the Secretary General was merely applying the rules, and there was no breach of due process since it was still open to her to seek help from a fellow staff member.

13. The complainant pleads breach of Rule 31.3 in the Secretary General's failure to consult the Staff Committee. She points out that the Administration is bound to seek the Committee's advice on matters of general interest to the staff or arising out of the Staff Regulations and Rules, but failed to seek such advice on the policy of renewal.

14. The plea cannot be sustained. A minute which the complainant herself has submitted as evidence and which the chairman of the Staff Committee wrote to the Secretary General shows that that Committee knew of the proposal to limit the reappointment of technical officers to five years. It made comments on that and other subjects to the Policy Commission at its 31st Session in June 1994 and to the Council at its 83rd and 84th Sessions in the same month, and the texts are in the case records.

15. Her other pleas bear on the merits. One is that the impugned decision flouted those that the Council had itself taken at those sessions in June 1994. In her submission the Council did not approve the Secretary General's proposals for changing the policy of reappointment; instead it asked him to propose transitional measures; so his decision shows a mistake of law insofar as it purports to rest on decisions of the Council's.

16. She is thereby misreading the relevant records of the sittings the Council held from 20 to 22 June 1994. Point 270 of those records says, about

the total duration of appointments of technical staff, that the Secretary General announced his intention to apply more strictly the rule in the Manual which provided for extension beyond five years only in exceptional cases, and that the Policy Commission broadly agreed. There is no evidence to suggest that the Council took any decision whatever about reappointment; so there can be no question of the Secretary General's failure to comply with any such decision.

17. The complainant says that the Secretary General's appraisal of her performance was plainly mistaken.

18. In a case of non-renewal the Tribunal will be especially cautious in reviewing any appraisal by a supervisor of the staff member's performance: the supervisor has the technical background and the knowledge of the staff member's work and personality that qualify him better than anyone else to advise the head of the secretariat on that score. Some appraisals of the complainant's performance are not good. As she admits, though her first-level supervisor saw some merit in her work he found her lacking in the "special training and skills" her post required. And though she does produce letters of commendation from several quarters, it is not for the Tribunal to choose between conflicting assessments: it is the executive authority that has discretion to do so. Besides, circular 187 says in (b) that "applications for renewal will be considered only in the case of particularly meritorious officials". In the absence of evidence to suggest that the complainant was such an official there was no obvious error in rating her performance.

19. The complainant takes the Secretary General to task for departing from a custom of extending five-year appointments and, in a subsidiary plea, for breach of certain general precepts which she describes as the defendant's "duty of fair treatment" and her own "career prospects" and "rightful expectations".

20. She relies on what she says was the Council's established practice of granting another five years to nearly everyone who wanted them provided that the "home Administration" gave its assent.

21. To be binding in law a practice must be so constant and consistent as to reflect a general rule: see for example Judgment 1080 (*in re* Barahona No. 3 and others) under 7. Contrary to what the complainant contends, the *ad hoc* working party never expressly cited any general and consistent practice in the matter of renewal. At all events, an organisation may always put an end to a practice provided it does not thereby infringe any provision of the rules and the change is properly announced and not brought

in retroactively: see Judgment 767 (*in re* Cachelin) under 9. That is just what the Council did. As it points out, its Secretary General proposed in a report of April 1994 on reform of the secretariat that a single five-year appointment should be the rule for officials in category A, who should get an extension only in exceptional circumstances and even then for only up to two years. He repeated that proposal in addressing the Policy Commission and the Council in June 1994. His proposal plainly squared, too, both with Rule 9.1 and with (b) of circular 187, which reads:

> "Applications for renewal will be considered only in the case of particularly meritorious officials whose reappointment would be in the best interest of the Council."

So all staff in category A had reason to expect the Council to be applying to them the new policy thus announced, which superseded the one followed till then, including of course any practice implementing it. The complainant's plea is rejected.

22. Insofar as the refusal of more than one year's extension was warranted in law the Council did not act in breach of any expectation she may have had to the grant of her request for five years.

23. She is mistaken in pleading breach of the Council's "duty of fair treatment". Before he took his final decision the Secretary General was at pains to see her and tell her what he had in mind; he offered her a shorter extension; and he saw her again at the end of 1994. He gave her one year to let her arrange for the return of her family to Argentina. The conclusion is that the attitude of the Secretary General, whose good faith she herself does not challenge, cannot be deemed to constitute breach of any duty of fair treatment he owed her.

24. Nor was there any breach of her "career prospects". Career prospects are not something that exist independently. If the refusal of renewal is lawful, so is the ending of the career. Since the complainant got a renewal for one year, her career with the Council ended lawfully on expiry of that year. For her plea to succeed the decision to extend her appointment would have to be set aside. As for her claims to reinstatement or, failing that, to an award of damages, they can likewise succeed only if the decision is set aside.

25. The plea of breach of equal treatment is disallowed. A strong line of precedent says that for that plea to succeed there must be different treatment of officials who are in like case both in fact and in law. The complainant is protesting at the Council's failure to apply to technical officers like herself a

rule it has applied to directors. But staff in the two categories are not in like case either in fact or in law.

26. There is greater cogency in her plea of misuse of authority. The real reason for the impugned decision, she says, was the Secretary General's plan to shift her duties as public relations officer to the new head of his own office and so release budget funds to finance a post for a special assistant for himself.

27. There will be misuse of authority when an administration seeks to attain some purpose other than those which the authority is supposed to serve or, to put it more broadly, one that is irrelevant to the organisation's interests at large. So the plea cannot succeed without proof of the unlawful purpose which the exercise of discretion — here the renewal — was intended to serve. The charge may not be presumed but must be proved.

28. In support of her plea the complainant points to the Secretary General's whole attitude; he said nothing of having his "special assistant", i.e. the head of his own office take over her duties, when that was obviously the purpose of his decision.

29. The evidence does not bear out the charge. In a letter of 27 September 1995 the Secretary General informed the heads of delegation on the Council that the post of senior technical officer in the Division of Human Resources Development Services was to become vacant on 28 January 1996 and he asked them to name candidates. That point alone, which the complainant cannot challenge, suffices to answer what she says about the post in the Secretary General's office.

30. She makes further allegations in support of her plea of misuse of authority: the Secretary General's explanations were merely formal, and inconsistent and clearly wrong besides; he refused to consult the Administration Committee; and his "decision" of 12 July 1994 was "plainly irreceivable". The Tribunal has already rejected her allegations as immaterial or devoid of merit. What she says is mere conjecture, and she offers not a shred of evidence in support. That is plain from the phrases she uses: "it is conceivable", "it may well be", "the restrictions imposed by member States may be genuine in general", and so forth. There being no proof of misuse of authority, nor any need to entertain her other arguments, which are either irrelevant or superfluous, the plea fails.

31. Since her main claim to the quashing of the decision must fail, so do her claims to awards of damages and costs.

## DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Michel Gentot, Vice-President, and Mr. Edilbert Razafindralambo, Judge, sign below, as do I, Allan Gardner,Registrar.

Delivered in public in Geneva on 30 January 1997.

*(Signed)*

WILLIAM DOUGLAS MICHEL GENTOT E. RAZAFINDRALAMBO

A.B. GARDNER

## EIGHTY-SECOND SESSION

***In re* Pennisi** **Judgment 1611**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Giuseppe Pennisi against the International Labour Organization (ILO) on 8 January 1996 and corrected on 15 February, the ILO's reply of 23 May, the complainant's rejoinder of 24 June and the Organisation's surrejoinder of 31 July 1996;

Considering Articles II, paragraph 1, and VII of the Statute of the Tribunal and Article 6, paragraph 2, of its Rules;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, an Italian, joined the staff of the ILO in February 1992 under a two-year appointment as director of the Organization's branch office in Rome. After extending his appointment by one year the ILO came to hear of a conversation which he had had in May 1994 with a senior Italian civil servant and in which he had allegedly criticised management practices in the Organization's International Training Centre at Turin.

Relations between the complainant and the Centre soured and the Administration offered him a final six months' extension of appointment on terms that the parties agreed to on 30 January 1995. According to the agreement he was to go on special leave with pay and the parties undertook to "refrain, unless the other party has previously agreed otherwise, from any declaration, value judgment or comment" on his activities or the performance of his duties as director of the Rome office.

In a memorandum of 31 July 1995 to the Director-General he accused the Director of the Centre of financial improprieties. He levelled similar accusations in a document he addressed on 4 August 1995 to the Italian ministers of foreign affairs, finance and labour.

From 24 July until 4 December 1995 he and the ILO were in correspondence about a claim he was making to payment of compensation for 15 days' annual leave which he said had accrued while he was on the paid leave provided for in the agreement. His counsel pressed that claim in a letter of 30 November 1995 to the Legal Adviser of the International Labour Office, who promised in a reply dated 4 December 1995 to notify the Organization's decision as soon as it was taken. The complainant is impugning the rejection that he infers from the ILO's failure to notify by 8 January 1996 any such decision.

B. The complainant submits that the ILO's withholding of sums due to him in lieu of accrued annual leave is in breach of the rules on special leave in Article 7.7 of the Staff Regulations. In his view the Organization is wrong to accuse him of breach of the agreement of 30 January 1995: he was, he contends, under a "legal and ethical obligation" to inform the Italian Government of matters "that might have criminal relevance".

He charges ILO officials with "misleading" him about his pension entitlements and seeking to besmirch his good name.

He seeks payment in lieu of accrued leave under Article 7.7 of the Staff Regulations and "compensation" — including the publication at the ILO's expense of formal apologies in five newspapers and two periodicals — for the "faulty and misleading information" it gave him in correspondence; for failure to apply Articles 6.7 (on performance appraisals), 12 (on sanctions) and 13 (on appeals) of the Staff Regulations; for the "disregard" of two ILO circulars and two of the Tribunal's judgments; and for "the smearing campaign conducted" by the Director of the Turin Centre against him. He also claims costs.

C. In its reply the ILO contends that the complaint is irreceivable. The complainant lodged it only 39 days after submitting the claim of which he is inferring rejection under Article VII(3) of the Tribunal's Statute: so at the date of filing there was not yet any implied rejection against which appeal might lie. His other claims are about matters he failed to mention in his internal appeal and are in any event time-barred.

In subsidiary argument on the merits the ILO submits that there was nothing improper in its withholding payment for accrued annual leave: the complainant's breach of the agreement of 30 January 1995 invalidated the agreement. Even if the agreement still held good, the harm he caused the Organization would warrant non-payment. His other claims too are devoid of merit.

D. In his rejoinder the complainant presses his claims. By the time he submitted what he calls his "drastically" revised complaint the ILO's objection to receivability was no longer valid.

E. In its surrejoinder the Organization presses its pleas and observes that the material date of filing is the one that the Registry of the Tribunal stamped on the complaint form: 8 January 1996.

## CONSIDERATIONS

1. The complainant joined the ILO on 1 February 1992 as director of its branch office in Rome on a two-year contract. He had his appointment extended by one year.

2. Although the office in Rome had no direct responsibility for the ILO's International Training Centre at Turin, he had some functions in relation to the Centre. It is not in dispute that in 1994 he persistently criticised the management, operation and costs of the Centre. The ILO says that it received reports that he had voiced similar criticisms to Italian civil servants as well, and he has admitted to at least one such instance.

3. After inquiry the Director of the Personnel Department wrote the complainant a letter on 24 November 1994. She said:

> "... it would not be useful to take a position on the extent to which the allegations of improper action are well-founded (which would have possible consequences from a disciplinary point of view), it is unfortunately clear that your apparent lack of confidence in the Centre is matched by the Centre's total lack of confidence in yourself as an independent international civil servant, for which your attitude is largely to blame. ...
>
> It is recognised that you are a capable official and that you have been of real service to the Office and also to the Centre in a number of respects. ... But [there is] a risk of running into the kind of conflicts experienced in the past. Whatever your shortcomings and merits, this is a serious handicap that precludes the continuation of your association with the ILO as Director of the Rome Branch Office ..."

4. After some months' negotiation the ILO concluded with the complainant an agreement dated 30 January 1995 whereby it extended his appointment by only six months, to 31 July 1995; during that period he was to be on special leave with pay but at the ILO's disposal for missions or other services. The agreement further provided for:

> "(i) waiver by [both parties] of any action, or continuance thereof, inside the Organization or outside it, against anyone with respect to any issue or fact that may relate or be taken to relate to [the complainant's] activities or to the performance of [his] duties as director of the Rome office; (ii) an undertaking [by

> each of the parties] to refrain, unless the other party has previously agreed otherwise, from any declaration, value judgment or comment on such issue or fact."

5. The complainant was in fact kept on leave with pay for most of the six months. In a letter of 24 July 1995 to the Director of Personnel he claimed payment of compensation for 15 days' annual leave that he said had accrued to him from 1 February to 31 July 1995, and he cited Article 7.7 of the Staff Regulations, which reads:

> "(a) Special leave, with full or partial salary or without salary, may be granted by the Director-General to an official for advanced study or research in the interest of the Organization, or for other exceptional or urgent reasons. ...
>
> (b) Periods of special leave without salary of one month or more shall not count as service for the purpose of calculating entitlement under the Staff Regulations to annual leave, sick leave ..."

The Director replied in a letter of 31 August that at the time of negotiation on the extension it had been agreed that annual leave should not accrue. She added:

> "If, however, you can assure me on your honour that you have no recollection of such discussion, I will give instructions to have the accrued leave paid for the period ..."

She then asked him for an explanation on another matter: although the ILO had strictly abided by the agreement it had heard from several sources that he had submitted to various authorities in Italy a "document" repeating "defamatory allegations" about the Turin Centre of a kind precluded by that agreement as well as by Articles 1.1 to 1.3 of the Staff Regulations.

6. There ensued a lengthy exchange of letters between the ILO and the complainant's counsel. In the meantime the ILO got hold of a copy of a memorandum dated 4 August 1995 which the complainant had addressed to the three Italian ministers. Not only did it contain serious criticisms of the Centre but it revealed that since 1994 he had been addressing repeated criticisms of the Centre to Italian civil servants.

7. By November 1995 he had given no assurance that he did not recollect any discussion about waiver of annual leave; but he continued to demand prompt payment on the grounds that such waiver must be express and in writing. Although at first — says the ILO — it was inclined to accept his claim because "it was not in a position to prove this gentleman's agreement", it later decided against the claim on receiving evidence that he had acted disloyally and in breach of the agreement of 30 January 1995. Despite its

repeated requests he failed to provide particulars of even a single example of the improprieties he was alleging.

8. The correspondence concluded with a letter that his counsel wrote on 30 November 1995 to the Legal Adviser pressing his claim to payment of compensation for accrued annual leave.

9. Counsel lodged his complaint on 8 January 1996, purporting to act under Article VII(3) of the Tribunal's Statute on the grounds that the ILO had not yet taken any express decision on the claim notified to it in the letter of 30 November 1995. The complaint consisted of the complaint form, duly filled up in its essential points and signed, and of a brief; there were, however, no items of evidence but just a reference under point 4(b) of the complaint form, which requires a list of such items, to "documents available in the ILO files". In a letter of 15 January 1996 the Registrar told counsel that the Tribunal did not have access to those documents and in accordance with Article 6(2) of the Tribunal's Rules gave him thirty days from the date of receipt of the letter in which to correct the complaint by filing any items he believed to be material and by making references to them in his brief. Counsel sent the corrected version of the complaint on 15 February 1996.

10. Besides claiming compensation for accrued leave the complainant alleges various other breaches of the terms of his appointment and of the Staff Regulations: that the ILO gave him no appraisal of his performance in 1994; renewed his contract for only six months in January 1995 and not after July 1995; gave him incorrect information about his pension entitlements; and waged a campaign to smear him.

*Receivability*

11. The ILO contends that the complaint is irreceivable because it is premature and because of the complainant's failure to exhaust the internal means of redress as to some of his claims.

12. The complainant is impugning the implied rejection of the claims notified in his letter of 30 November 1995. The only claim notified in that letter was to payment of compensation for accrued annual leave. All his other claims are therefore irreceivable under Article VII(1) of the Tribunal's Statute because he has failed to have recourse to his internal remedies.

13. As for his claim to compensation for leave, only where the Administration has failed to take a decision upon any claim within sixty days of the notification thereof does Article VII(3) of the Statute allow direct complaint to the Tribunal. The complainant argues that he lodged his complaint after the lapse of the sixty days: although he filed what he calls an

"initial" complaint on 8 January 1996, before such lapse, he points out that his counsel drastically revised it, added written evidence and supplied a new complaint form on 15 February.

14. It was open to the complainant to withdraw the obviously premature complaint of 8 January and lodge a new one which complied with the time limit in Article VII(3). What his counsel supplied on 15 February was no new complaint but merely a version of the original one corrected in compliance with the Registrar's instructions. So for the purpose of a ruling on his observance of the time limit his complaint is still the one filed on 8 January. His claim about annual leave is therefore premature and for that reason it too is irreceivable.

*The merits*

15. Article 14.6 of the Staff Regulations provides:

> "No exception may be made to these Regulations unless the official concerned consents, and only if such exception does not prejudice the interests of any other official ..."

The ILO maintains, and the complainant has never denied, that in January 1995 they agreed that annual leave would not accrue. That agreement, though not in writing, constituted an exception to Article 7.7, and the complainant was bound by it. His claim about annual leave is therefore in any event devoid of merit.

16. The conclusion is that the complainant's claims fail in their entirety.

## DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 30 January 1997.

Wm Douglas

WILLIAM DOUGLAS

Mella Carroll

MELLA CARROLL

MARK FERNANDO

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

A.B. Gardner

A.B. GARDNER

## EIGHTY-SECOND SESSION

## ***In re* Cook (No. 4)** **Judgment 1612**

THE ADMINISTRATIVE TRIBUNAL,

Considering the fourth complaint filed by Mr. Steven Derek Cook against the European Patent Organisation (EPO) on 25 November 1995, the EPO's reply of 16 February 1996, the complainant's rejoinder of 12 May and the Organisation's surrejoinder of 12 June 1996;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and disallowed the complainant's application for hearings;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, who is British, works for the European Patent Office, the secretariat of the EPO, at its Directorate-General 1 (DG1) at The Hague. Facts relevant to this case appear in Judgment 1296 of 14 July 1993, on his first complaint, which was about the child allowance payable in the Netherlands, and Judgment 1333 (*in re* Franks No. 2 and Vollering No. 2) of 31 January 1994, a case in which he was an intervener and which was about deductions from family allowance made on account of participation in a strike of EPO staff at The Hague.

From a pay slip he got on 26 February 1994 for the month of February 1994 the complainant learned that the Organisation had made two deductions from the child allowance payable for his handicapped dependent daughter. One deduction, amounting to one-thirtieth of the allowance, was made because he had gone on strike on 8 December 1993. The other, of 101 guilders, was made on account of the child allowance known as the *kinderbijslag* that his wife was receiving from the Dutch State.

By a letter of 26 May 1994 he appealed against the deductions to the President of the Office. The President referred the matter to the Appeals

Committee. In its report of 4 July 1995 the Committee recommended making good the deduction for going on strike but not the one attributable to payment of the Dutch child allowance.

By a letter of 11 August 1995, which he impugns, the Director of Staff Policy told him that the President was rejecting his appeal.

B. The complainant submits that the Tribunal's rulings on the basis for payment of child allowance are inconsistent. If such allowance is a social benefit, payment of it cannot depend on services rendered. The EPO's practice too is inconsistent and discriminatory. The Organisation has infringed his human rights.

He asks the Tribunal:

> "(a) to quash the decision of the President of the EPO dated 11/8/95 to reject my internal appeal ...;
>
> b) to order full reimbursement of strike deductions made from the handicapped dependent child allowance I receive for my eldest daughter;
>
> c) to declare the judgments 1041 and 1333 vitiated by the fact that the Tribunal failed to take into account Internationally agreed principles on social security and the right of the family to social protection;
>
> d) to order reimbursement of all past *'kinderbijslag'* deductions made from the EPO dependent child allowance;
>
> e) to order the EPO to enter into discussions with the Netherlands government to establish a bi-lateral legal framework, consistent with national and European Union law, for the application to EPO employees in the Netherlands of the principle of the non-cumulation of social benefits paid for the same social purpose;
>
> f) to order the EPO to refrain from making *'kinderbijslag'* deductions until a proper legal basis, consistent with National and European Union law, has been established with the Netherlands government;
>
> g) to declare that the withholding by the EPO of the handicapped child allowance from an employee participating in strike action is a form of discrimination and punishment justified in neither the law of the EPO Service Regulations nor in internationally agreed standards on social security and human rights;
>
> h) to condemn the EPO for its abuse of its public authority when making strike deductions from family allowances;
>
> i) to order an independent enquiry into the functioning of the Tribunal itself and whether it meets the necessary standards of impartiality and justice to be expected of an international Tribunal of last instance (last instance for the complainant);
>
> j) to order payment of at least [50,000 guilders] to me as moral damages for the harm and grief caused by the challenged decision of 11/8/95.
>
> k) to award costs to me currently estimated at [10,000 guilders]".

C. In its reply the EPO contends that the complaint is in part irreceivable and, subsidiarily, devoid of merit.

Since the Tribunal has already dismissed claims from him that turn on payment of the Dutch child allowance, his claims (d) to (f) are *res judicata*. In any event he fails to offer any new pleas in support.

On the merits the EPO points out that Judgment 1333 upheld the lawfulness of deductions made under Articles 64(2) and 65(1)(b) of the Service Regulations from the dependant's allowance on account of strike action. So the complainant's allegations of discrimination and victimisation are unfounded.

D. In his rejoinder the complainant presses his claims and enlarges on his pleas. He says it is odd to make deductions from a dependant's allowance because the official has gone on strike, yet still treat it as a "purely social" benefit like those paid under Dutch social security.

E. In its surrejoinder the EPO submits that the rejoinder raises no new material issue.

## CONSIDERATIONS

1. In his introductory remarks in his original brief the complainant questions the Tribunal's competence to hear this case. By filing his complaint he has invoked the Tribunal's jurisdiction. Though free to withdraw it at any time before the Tribunal took it up he has not done so. The Tribunal sees no reason why it is not competent to rule on his case. Nor is it appropriate for him to ask the Tribunal — as he does in the same introductory remarks — to tell him to which court he should appeal or to proceed no further pending "full judicial review" of Judgments 1041 (*in re* Lammineur), 1296, 1297 (*in re* Theuns No. 3) and 1333.

2. On 8 December 1993 he took part in a one-day strike of EPO staff at The Hague. The pay slip he got on 26 February 1994 for that month showed that for his three children the EPO had made deductions of two kinds against the sums paid in dependants' allowances. One deduction was made on account of the payment to his wife of the *kinderbijslag*, the child allowance due from the Dutch State; the other was made, on account of his going on strike, from the amounts of the dependants' allowances payable by the EPO for his three children.

3. On 26 May 1994 he lodged three internal appeals against the deductions for each of his three children. He sought reimbursement of the sums deducted and a recommendation that the Organisation should seek an advisory opinion from the International Court of Justice on the Tribunal's judgments on the issue.

4. In its report of 4 July 1995 the Appeals Committee recommended allowing the complainant's claim to reimbursement of the deductions made from the dependants' allowances on account of his participation in the strike, or else negotiating a solution. But it recommended rejecting his claim to reimbursement of the deduction made on account of payment of the *kinderbijslag* on the grounds that the issue was *res judicata*, Judgment 1296 having ruled on it in the context of his first complaint. The Committee took the view that a staff member had no right to have a case referred to the International Court of Justice and it therefore made no recommendation on that score.

5. In a letter of 11 August 1995 to the complainant the President rejected on the merits his claim to repayment of the deductions from his dependants' allowances and rejected as *res judicata* his claim to repayment of the deduction made on account of the *kinderbijslag*. That is the decision he is impugning in this complaint. He lodged another two, his fifth and sixth, claiming full allowances for each of his other two children, but he has since withdrawn them. The present complaint concerns only the allowance for his handicapped daughter.

6. Having taken part in a strike of EPO staff on 11 December 1991, the complainant intervened in the second complaint which Mr. Nigel Franks and Mr. Johannes Vollering had lodged against the Organisation, and which challenged deductions made from family allowances on account of participation in that strike. Judgment 1333 dismissed both complaint and intervention: confirming Judgment 1041, it ruled that the Organisation had acted correctly in making the deductions from remuneration, including the allowances. Judgments 1041 and 1333 were based on an interpretation of Article 64(2) of the EPO Service Regulations, which says that "Remuneration shall comprise basic salary and, where appropriate, any allowances". The complainant is bound by the Tribunal's ruling on the issue. A dependant's allowance may be due whether the child is handicapped or not; so for the purpose of interpreting 64(2) no distinction is to be drawn between the dependant's allowance and the handicapped dependant's allowance.

7. As for the deduction made from the dependant's allowance on account of the payment of the *kinderbijslag* by the Dutch State, it is authorised under Article 67(2) of the Service Regulations:

> "A permanent employee in receipt of family allowances shall declare allowances of like nature paid to him, to his spouse or to his dependants from other sources; these allowances shall be deducted from those paid under these Service Regulations".

The complainant challenged the lawfulness of such deduction in his first complaint. Judgment 1296 dismissed that complaint on the grounds that the EPO dependant's allowance was of like nature and that the Organisation's practice was lawful. The claim to repayment of deductions made on account of the *kinderbijslag* is therefore also irreceivable under the *res judicata* rule.

8. The Organisation has applied for joinder of this case with Mr. Vollering's seventh, eighth and ninth complaints. The Tribunal disallows the application. Mr. Vollering's seventh complaint is dismissed as irreceivable in Judgment 1566, also delivered this day, which does not go into the merits. His eighth is about a different aspect of the *kinderbijslag*, namely the receipt of a lump sum in respect of back payments. And his ninth has been adjourned at his own request.

9. Insofar as the complainant's claims as set out in B above are not already *res judicata* they did not form part of any internal appeal and are therefore irreceivable under Article VII(1) of the Tribunal's Statute because he has failed to exhaust his internal remedies. The claim to costs, being subsidiary, must also fail.

## DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 30 January 1997.

Wm Douglas

WILLIAM DOUGLAS

Mella Carroll

MELLA CARROLL

MARK FERNANDO

A.B. Gardner

A.B. GARDNER

Organisation internationale du Travail International Labour Organization
*Tribunal administratif* *Administrative Tribunal*

***Registry's translation,***
***the French text alone***
***being authoritative.***

# EIGHTY-SECOND SESSION

## ***In re* Evalet Arsène, Haeberli (No. 2) and Maurer** **Judgment 1613**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Miss Chantal Evalet Arsène and Miss Elvira Maurer and the second complaint filed by Mr. Heinz Haeberli against the European Free Trade Association (EFTA) on 15 March 1996, EFTA's reply of 2 July, the complainants' single rejoinder of 16 August and the Association's surrejoinder of 28 October 1996;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which none of the parties has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainants, who are Swiss, used to be established officials of EFTA. Miss Evalet Arsène joined its staff in 1964 and Mr. Haeberli in 1967. They left on 30 June 1995, when it abolished their posts. Miss Maurer, who had been on the staff since 1973, left on 28 February 1995 to take up another job; her post too was to be abolished on 30 June 1995.

When it recruited them EFTA had no pension scheme but a Provident Fund, which they joined. They were also contributing to the Swiss national scheme for old-age and survivors' pensions known as the AVS (*Assurance vieillesse survivants*) and EFTA matched their contributions with its own. In 1980 it introduced a "Staff Insurance Scheme" (SIS) with effect from 1 July 1977. Under that scheme the staff were free to choose between a Pension Fund and a Savings Fund if they did not want all their assets in the Provident Fund to move automatically to the Pension Fund. The complainants chose the Savings Fund. They and the Association continued to make payments to the AVS.

In 1989 the Association reformed the Pension Fund and told the complainants that it would stop making payments to the AVS for them. They then chose to leave the AVS and join the reformed Pension Fund as from 1 January 1989. To qualify for a pension under the Fund required ten years' contributions. Participation carried the right to cover under a group health insurance policy.

Several countries having withdrawn from membership, EFTA dissolved the Pension Fund on 30 June 1995 and a private Swiss insurance company took over its assets and liabilities.

By a single memorandum of 10 February 1995 the complainants had asked the Secretary-General for leave to buy at the rate of 21.3 per cent of the "reference salary" the further three-and-a-half years' membership in the Fund which each of them needed to make up the ten and so qualify for a pension. In letters of 30 June 1995 the chairman of the Management Board of the SIS offered them validation of the three-and-a-half year periods in return for payments to be reckoned at a much higher rate. The complainants refused and by letters of 12 December 1995 appealed to the Secretary-General.

In letters of 19 December 1995, the decisions they impugn, the Deputy Secretary-General, who had also been chairman of the Management Board told them that his letters of 30 June had conveyed "the official position of the Secretary-General" and that appeal lay to the Tribunal under Staff Regula-tion 41(b).

B. The complainants submit that the impugned decisions are unlawful. The offers in the chairman's letters were *ultra vires* and had no basis in law. When revising the Pension Fund in 1989 EFTA gave rise to legitimate expectation that the Fund would last for at least ten years. There has been breach of equal treatment inasmuch as EFTA let other officials validate periods of membership at better rates.

The complainants want the Tribunal to order EFTA to let each of them validate another three-and-a-half years' membership of the former Pension Fund by making payments to be reckoned at the rate of 21.3 per cent of final "reference salary" and transfer those sums to the Fund's successor, *Rentes genevoises*, so as to secure the pension rights deriving under the former Staff Insurance Scheme from ten years' membership. They claim costs.

C. EFTA replies that the complaints are irreceivable because the complainants have failed to exhaust the internal remedies set out in the Regulations of the Staff Insurance Scheme. It challenges their *locus standi* on the grounds that acceptance of the "transfer value" of their entitlements has deprived them of the status of beneficiaries of the Pension Fund, who also enjoy the right of appeal.

In subsidiary argument, the Association submits that the complaints are devoid of merit. It complied in full with the Regulations. There was nothing in its original offer of membership to suggest that the Fund would survive for at least ten years or indeed that the complainants would be on its staff that long. It denies breach of equal treatment: the officials they mention are not in like case.

D. In their rejoinder the complainants rebut various points of fact and law in the reply and press their claims.

E. In its surrejoinder EFTA says the complainants have not put forward any new arguments in law. Because they have produced with their rejoinder a "restricted" document about the rules of procedure of the Management Board of the SIS, it asks the Tribunal to sanction such "intentional abuse of process".

## CONSIDERATIONS

1. The complainants, who are Swiss, were officials of the European Free Trade Association (EFTA) until 1995, when they left. The decisions they are impugning are those that the Secretary-General took on 19 December 1995 confirming earlier ones, of 30 June 1995, that allowed them to purchase the three-and-a-half further years' membership of the Association's former Pension Fund that they each needed to qualify for the grant of minimum pensions. The dispute is not about their right to validate, which EFTA thus concedes, but about the cost of validation. The Administration argues that they should pay the "real cost", whereas they say they should pay no more than the equivalent of 21.3 per cent of final "reference salary", that being the rate to which they are entitled under Article 13(2) of the Regulations of the old Staff Insurance Scheme (SIS).

2. An account of the changes EFTA made in its pension scheme over the years will shed light on the material issues. Until 1977 it had no pension fund at all. Instead it offered a savings scheme under which its staff might contribute to a Provident Fund; staff members of Swiss

nationality paid a share into the Swiss scheme for old-age and survivors' pensions known as AVS and the Association contributed equal amounts on their behalf. In 1977 it set up a Pension Fund and a Savings Fund and invited its staff to opt for one or the other. In the knowledge that they would be getting old-age pensions from the AVS the complainants opted for the Savings Fund.

3. Further reforms came into effect at 1 January 1989. EFTA then invited its staff to choose between the Savings Fund and the Pension Fund. This time it said it would stop paying half the contributions to the AVS, and the pressure on the complainants grew so great that they chose to leave the AVS and joined the Pension Fund as from 1 January 1989. They declined, however, to validate past periods of membership, which would have required them to transfer some of their holdings from the Savings Fund. The complainants duly contributed for six-and-a-half years to the Pension Fund which ceased to exist at 30 June 1995. At that date the Association abolished several posts in the context of reforms required by the withdrawal of three member States to join the European Union. It then ended the complainants' and other appointments and wound up the Pension Fund. A Swiss company known as "*Rentes genevoises*" took over the Fund's assets and liabilities. That left the complainants with no pension entitlements at all since only someone who had been contributing to the Fund for at least ten years qualified for a pension. So on 10 February 1995 they applied for their right to buy the further three-and-a-half years' membership they needed to qualify. By letters of 30 June 1995 the chairman of the Management Board of the SIS told them that, though they could not go back on the choice they had made in 1989 not to validate earlier periods of membership, the Board was willing if need be to waive any time limit to let them validate if they so wished, but only at "real cost"; there was no longer any question of validation at the rate of 21.3 per cent of "reference salary".

4. Two of the complainants, Miss Evalet Arsène and Mr. Haeberli, answered on 5 July 1995 that they were declining that offer. They then applied for transfer to their own accounts of the lump sums due from the Fund under Article 18(2) of the Regulations of the SIS. Miss Maurer too turned the offer down in letters dated 3 and 20 July 1995. She had already in March 1995 been paid the sums due to her.

5. The complainants wrote letters to the Association on 12 December 1995 asking what had become of their claims. The answer came in letters dated 19 December 1995 which confirmed the Secretary-General's official

position as notified in the letters of 30 June 1995. In answer to an earlier letter Mr. Haeberli was also told that the Association had been unable to set up the Advisory Board provided for in the Staff Regulations and that appeal would therefore lie to the Tribunal under Staff Regulation 41(b). The complainants came to the Tribunal on 15 March 1996.

6. In its reply the Association demurs at joinder but in its surrejoinder it agrees. The cases are joined to form the subject of a single judgment.

7. EFTA raises cogent objections to receivability. It contends that the complainants should, under Article 10 of the SIS Regulations, have appealed against the Management Board's decision of 30 June 1995; that such appeal lay either to the Secretary-General within ninety days or to the Board itself; but that the complainants, who chose appeal to the Secretary-General, waited until 12 December 1995, 165 days after they had had notice of the Board's decision.

8. For one thing, EFTA itself admits to mistakes in the numbering of the provisions to which Article 10(1) of the Regulations refers, and they may well have misled the complainants. For another, the Association set up no Advisory Board, though Staff Regulation 40 provided for one. Yet the complainants were entitled to expect referral to the Advisory Board of their refusal to accept what they thought an unfair offer. And thirdly, the Deputy Secretary-General himself told them in the decisions of 19 December 1995 that in the absence of a recommendation from the Advisory Board they might go to the Tribunal. All things considered, the complaints must be declared receivable.

9. They also succeed on the merits.

10. Article 13 of the Regulations of the SIS lays down the terms on which members of the Pension Fund may, with the Management Board's consent, validate further periods of membership. Although they are required as a rule to apply within one year of getting a permanent appointment, the last sentence of 13(1) empowers the Board to grant exceptional consent thereafter to such an application and "fix the conditions of its acceptance".

11. EFTA admits to having applied that provision to officials who had permanent appointments in 1989 and who did not therefore fill the applicable conditions. On that score it says that the provisions of Articles 36 and 36bis of the SIS Regulations, which set a time limit of one year for exercising the option of validation, preclude offering that option thereafter.

There is some force to the plea. Yet what it overlooks is that Article 13 is quite unrestricted in scope and indeed it was, as the defendant acknowledges, by so construing the text that it felt able to accept, on certain terms, the complainants' claims to validation.

12. Was the competent authority free, on the strength of the last sentence of 13(1), to lay down conditions as to the cost of validation otherwise than as prescribed in 13(2)? Article 13(2) reads:

> "The cost of purchasing added periods of membership in accordance with the provisions of paragraph 1 shall be calculated on the basis of the member's reference salary (Article 15) at the time his application is made."

It sets at 21.3 the percentage of reference salary. Since 13(2) refers back to the whole of 13(1) without distinguishing between ordinary and exceptional validation, the conclusion must be that the cost is invariable and consent to validation may not be made to depend on the acceptance of other terms. Once the Management Board had conveyed through its chairman its "exceptional" consent to the complainants' claims, it had no grounds in law for setting the cost of validation otherwise than as stipulated in 13(2).

13. There is no need to entertain any of the complainants' other pleas or their application for the disclosure of evidence. The Tribunal will set aside the Secretary-General's decisions of 19 December 1995 confirming the decisions of 30 June 1995 by the chairman of the Management Board of the SIS and refer the case to the Association for new decisions on the complainants' claims. It may not itself take the decisions that the complainants want, which fall within the competence of EFTA bodies. It therefore disallows their claims to an order that EFTA let them validate "at the price of 21.3%" of the reference salary and "transfer these amounts to the Rentes Genevoises".

14. The Association has sent the Tribunal in a sealed envelope the full text of a document of which part is produced as an annex to its reply and invites the Tribunal to decide whether to let the complainants see it. As a rule any item disclosed by one of the parties to judicial proceedings in support of its case must go to the other. But in the circumstances the text produced by counsel for the Association is immaterial. So it is simply disregarded and is to be returned to the Association.

15. The complainants are entitled to a total award of 10,000 Swiss francs in costs.

## DECISION

For the above reasons,

1. The decisions of 19 December 1995 by the Secretary-General of EFTA are set aside.
2. The cases are referred to the Association for new decisions on the complainants' claims.
3. The Association shall pay them a total of 10,000 Swiss francs in costs.
4. Their other claims are dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Michel Gentot, Vice-President, and Miss Mella Carroll, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 30 January 1997.

*(Signed)*

WILLIAM DOUGLAS MICHEL GENTOT MELLA CARROLL

A.B. GARDNER

Organisation Internationale du Travail
*Tribunal administratif*

International Labour Organisation
*Administrative Tribunal*

***Registry's translation, the French text alone being authoritative.***

# EIGHTY-SECOND SESSION

***In re* Morelli** **Judgment 1614**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs. Allegra Morelli against the International Fund for Agricultural Development (IFAD) on 10 April 1996, IFAD's reply of 21 June, the complainant's rejoinder of 8 August and the Fund's surrejoinder of 20 September 1996;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, an Italian who was born in 1936, joined the staff of the United Nations Children's Fund (UNICEF) in 1983. On 18 February 1991 she was seconded to IFAD for two years as Director of its Information and Communications Division at grade D.1. Her appointment, which was to expire at 17 February 1993, was extended by five years to 16 February 1998.

By a bulletin of 5 September 1994 the President of IFAD announced that he intended to reform its structure. The very same day the complainant talked to her supervisor, the Assistant President in charge of the Economic Policy and Resource Strategy Department, then to the President, about what the reforms would mean for her division. In a memorandum of 21 September she asked the Director of the Personnel Division how they would affect her own duties and status. On 23 September she saw the Director and the Assistant President. The parties disagree about what was said on 5 and 23 September.

By a letter of 27 September the Director of Personnel told her that the reforms entailed abolishing her post and so her appointment would end at 1 October 1994. By a letter of 31 October she asked the President to reconsider the decision but he confirmed it in a letter of 6 December 1994. On 3 February 1995 she lodged an appeal with the Joint Appeals Board.

In its report of 10 January 1996 to the President the Board held that the Fund had acted in breach of Article 5.7.11(b) of the Personnel Policies Manual, about the reassignment of staff on abolished posts, and recommended either keeping the complainant on until 16 February 1998 or ending her appointment properly. The Board believed that she was entitled to compensation over and above the termination indemnity that she would have got had her appointment been duly terminated. It recommended setting the amount of compensation by agreement with her, bearing in mind that her appointment was not to expire until February 1998.

On 5 February 1996 the Director of Personnel wrote to the complainant offering on the President's behalf a settlement that included payment of termination indemnity equivalent to 21.63 months' basic salary. She rejected the proposal in a letter of 8 February on the grounds that it fell too far short of what the Board had recommended. The attempts to settle having come to nought, she is impugning the decision of 5 February 1996.

B. The complainant submits that there was no genuine abolition of her post. Although her performance had always been rated good, she was the only woman at IFAD to be dismissed because of the reforms. The Fund committed a misuse of authority by taking advantage of the reforms to end her appointment.

It acted in breach of Article 5.7.11(b) of the Manual and the general rule that someone whose post is abolished should have priority for reassignment. It adduced no evidence of any attempt to reassign her, other than two items which it put to the Joint Appeals Board and which it had till then hidden from her in breach of her right of reply.

By the affront to her dignity the Fund caused her undue harm and serious moral injury.

She seeks the quashing of the impugned decision; material damages in an amount that would be in keeping with the Board's recommendations and take due account of the loss of her pension entitlements; moral damages; and costs.

C. In its reply IFAD denies fabricating the abolition of her post. The functions fulfilled by her old division have disappeared, the reforms were needed, and there was no misuse of authority.

An ad hoc committee set up to help in putting through the reforms considered her applications for other vacant posts but found her qualifications — a diploma in psychology and social welfare — and her professional experience to be unsuitable. The Fund did give her priority for reassignment but she was not "suited" to a single vacancy.

It admits failure to apply the redundancy procedure to her from the outset: it ought indeed to have looked "more systematically" for another job for her. But to make up it paid her her salary for six months until 31 March 1995, instead of just the prescribed three months in lieu of notice, and offered her compensation over and above the termination indemnity.

It denies causing her any undue injury or affront to dignity.

D. In her rejoinder the complainant enlarges on her pleas and pleads breach of due process. She submits that the Fund could have moved her to a post of which there was not yet a description and for which the requirements were not specific: it had done as much for two other directors.

E. In its surrejoinder IFAD denies depriving her of her right of reply. It acknowledges that her post was "frozen" rather than abolished but points out that that is common practice in the United Nations system. The two directors she mentions had more readily usable qualifications and experience than she and so were better suited to other jobs.

## CONSIDERATIONS

1. The complainant was with UNICEF until 18 February 1991, when she was seconded for two years to IFAD. She became Director of its Information and Communications Division and held grade D.1. On 27 October 1992 it extended her appointment, which was to expire at 17 February 1993, by five years to 16 February 1998.

2. On 5 September 1994 the President of the Fund announced plans to reform the secretariat which he said would take effect at 1 October 1994. Also on 5 September he saw the complainant and — says the Fund — told her that her division was to disappear. By a memorandum of 21 September she asked the Director of Personnel to tell her how that was to affect her own duties and status. On the 23rd her supervisor, the Assistant President in charge of the Economic Policy and Resource Strategy Department, and the Director of Personnel saw her and gave her some information on that score. In a letter of the 27th in reply to her memorandum of the 21st the Director of Personnel said that her post was to go and, as the Assistant President and he had told her on the 23rd, several courses of action were possible in such circumstances. He also gave her the prescribed notice of termination of her appointment as at

1 October 1994. By a letter of the 27th she sought help from the President. But he told her in a reply dated 24 October that he was upholding the decision.

On 31 October 1994 she appealed against the termination of her appointment. On 6 December the President confirmed it. Her case went to the Joint Appeals Board. The Board reported on 10 January 1996 in her favour. On 5 February the Director of Personnel made her an offer of a settlement by the grant of "additional compensation". She turned the offer down and, failing any later decision, she is impugning the one of 5 February 1996.

3. As circumstances change so must an organisation reform its structure, and that may mean doing away with posts. Even if abolition is not expressly provided for, no organisation can be required to abide for evermore by the same approach to what it has to do. The Tribunal may not replace an organisation's assessment with its own when savings or efficiency require reforms and will not review policy in that regard. But it has a duty to review any individual decisions, such as abolition of a post, that the organisation may take in furtherance of such policy. Thus it may determine whether such a decision shows any fatal flaw, such as the breach of a formal or procedural rule, a mistake of fact or of law, or misuse of authority.

4. The nub of the case is whether, as the complainant says, there was any flaw in the abolition of her post. She has two pleas: that the abolition was a sham and that the Fund failed in its duty to give her priority for reassignment.

5. On the first point she submits that she was not told of abolition either when she saw the Assistant President and the President or in replies to her written claims. But the allegation does not square with the facts. The terms of the Fund's letter of 27 September 1994 show that by that date she could not have been left in any doubt but that her post was to go since the letter said so in as many words and gave her notice of the termination that the abolition entailed. Besides, it is hard to see how the complainant, after acknowledging in her letter of 27 September 1994 that she had been told on 5 September 1994 that her division was to go, can have failed to infer that IFAD would therefore do away with her post as director of it. What is more, she observes in the same letter that her post had been removed from the organisation chart. So the plea is devoid of merit.

6. There is nothing to bear out her contention that the abolition was spurious. The department to which the Information and Communications Division belonged had two other divisions and the Fund merged the three. The merger entailed the abolition of the posts of the three directors, of which the

complainant held one. She cannot deny that the department was reformed and that its three component divisions disappeared.

7. There is no merit in her argument that the abolition of her post was not genuine. There were objective grounds for abolition: the improvement of efficiency. Though she may have been the only woman to be dismissed, though she may have had a good record, and though all her subordinates may have been kept on, those are not reasons for finding any flaw in the abolition of her post. As the Appeals Board held, her plea under this head cannot be sustained.

8. Her next plea is that the Fund denied her the priority for reassignment that it owed her under Article 5.7.11(b) of its Personnel Policies Manual:

> "... when a position is no longer necessary, for whatever reasons, the staff member concerned will be given due notice and during the period of notice the Fund shall attempt to reassign the staff member."

That rule, she says, embodies a general principle which the Tribunal has often applied, for example in Judgments 133 (*in re* Hermann) under 5, 1231 (*in re* Richard) under 25 and 1487 (*in re* Bouchelaghem) under 8. She argues that (1) the Fund did not take the time prescribed in the Manual to look for another job for her; (2) it has proved no attempt to do so; and (3) it acted in bad faith by offering the Appeals Board *ex post facto* evidence of such attempts.

9. The Fund replies that it gave her another six months "to see" whether any suitable vacancy might turn up and that it did give her priority for reassignment but that neither of the two D.1 posts vacant at the time was "suitable" for her.

10. The evidence does not bear out the defendant's case. Had the Fund considered her for vacancies it would have so professed in its letters of 27 September and 24 October 1994. As for the six-month extension, there are no grounds for supposing that the purpose of it was to find her a new assignment. IFAD itself says that the purpose was to let her arrange for the return to UNICEF which it "presumed" she had in mind. By its own admission it had a duty, after the failure of her "presumed" attempt to go back to UNICEF, to look "more seriously" into the possibilities of reassignment. By inference it had not "seriously" done so during the period of notice, as the rules required, or even afterwards. Indeed it has acknowledged by implication its failure to comply with that duty: why else offer her "additional compensation"

in relief? The plea succeeds and for that reason alone the impugned decision must be set aside.

11. Last comes her plea that IFAD impaired her dignity and caused her unnecessary injury. That is an issue that has a bearing on her claim to an award of moral damages. Precedent has it that the unlawfulness of the decision is not enough to warrant such an award (see Judgment 1131 (*in re* Louis) under 9): the decision must also cause humiliation or seriously wound feelings (see Judgment 447, *in re* Quiñones, under 11).

12. Here the impugned decision is to be quashed because of a flaw that discloses no malice. Contrary to what the complainant alleges, the reasons for abolishing her post were objective and had nothing to do with her own personality or performance. The decision cast no slight on her integrity and was no affront to her dignity. Her supervisors kept her informed orally and in writing about the progress of the reforms and about her own status. They thereby showed a wish to prepare her for the consequences and no bad faith may be imputed to them. The conclusion is that the defendant caused her no unnecessary or undue injury.

13. Yet she did suffer material injury: as has been said, the Fund recognises as much by implication. She is entitled under this head not only to the amounts it has already offered her by way of "additional compensation" but also to an award of damages in the amount of six months' pay. She is also awarded 3,000 United States dollars in costs.

## DECISION

For the above reasons:

1. The Fund shall pay her material damages as set out under 13 above.
2. It shall pay her 3,000 United States dollars in costs.
3. Her other claims are dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Michel Gentot, Vice-President, and Mr. Edilbert Razafindralambo, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 30 January 1997.

*(Signed)*

WILLIAM DOUGLAS MICHEL GENTOT E. RAZAFINDRALAMBO

A.B. GARDNER

Organisation internationale du Travail
*Tribunal administratif*

International Labour Organization
*Administrative Tribunal*

*Registry's translation,*
*the French text alone*
*being authoritative.*

## EIGHTY-SECOND SESSION

**Judgment 1615**

***In re* Boland (No. 9), Hardy (No. 3)**
**Heller (No. 3), Olivier (No. 3)**
**Rue (No. 3) and Watson (No. 5)**

THE ADMINISTRATIVE TRIBUNAL,

Considering the ninth complaint filed by Mr. Pierre Boland against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 14 November 1995 and corrected on 20 November 1995, Eurocontrol's reply of 1 March 1996, the complainant's rejoinder of 19 June and the Organisation's surrejoinder of 27 September 1996;

Considering the third complaints filed by Mr. Joachim Heller, Mr. Lucien Olivier and Mr. Jean-Paul Rue and the fifth one filed by Mr. Jeremy Watson on 24 January 1996 against the same Organisation and corrected on 1 April, Eurocontrol's joint reply of 12 July, the complainants' rejoinder of 23 August and the Organisation's surrejoinder of 18 October 1996;

Considering the third complaint filed by Mr. Jean-Lucien Hardy against the same Organisation on 26 January 1996 and corrected on 8 February, Eurocontrol's reply of 15 May, the complainant's rejoinder of 5 July and the Organisation's surrejoinder of 11 October 1996;

Considering Articles II, paragraph 5, and VII, paragraph 4, of the Statute of the Tribunal and Articles 11 and 16 of its Rules;

Having examined the written submissions and disallowed the applications for hearings filed by Mr. Boland, Mr. Heller, Mr. Olivier, Mr. Rue and Mr. Watson;

Considering that the facts of the cases and the pleadings may be summed up as follows:

A. The complainants joined Eurocontrol at various dates from 1965 to 1991 on permanent appointments. At the material time they were at its Institute of Air Navigation Services in Luxembourg.

In March 1994 the Agency's Committee of Management decided to change the Institute's functions, and that meant reforming its units. On 31 January 1995 the Personnel Directorate put out a paper about the procedure for redeploying staff. There were to be four phases: (1) a preliminary one, which consisted in identifying the jobs that the new administrative structure would require, and those for which staff were not needed and in drafting descriptions of vacant posts; (2) a process of assessment of the redundant staff; (3) redeployment within the Institute; and, if necessary, (4) redeployment elsewhere in the Agency. The paper cited Article 7 of the Staff Regulations, which is about assignment by appointment or transfer, and Article 8 of Rule of Application No. 2, which is about competitions and provides that, when the interests of the service so require, the Director General may, under Article 7 of the Staff Regulations, transfer someone to a post at the same grade without a competition.

At a meeting of staff on 24 March 1995 the Director of the Institute gave an account of the procedure and the results of the first phase. By letters of 28 March he told the complainants that their posts were not to survive the reforms but that a team of assessors would be interviewing each of them. In a memorandum of 31 March he issued a list of posts that the reforms had made vacant.

By a decision of 5 April the Director General approved the reforms. The assessors did their work from 5 April to 2 May. By a notice of 6 June signed by the Director of Personnel the Director General transferred the complainants to the office of the Director of the Institute as from 1 July pending decisions on redeploying them within the Agency. By a further decision of 6 June he changed the grading of some of the posts in the new structure. By letters of 14 June the Director of Personnel informed the complainants of the arrangements for their transfer from Luxembourg.

On 28 June the complainants lodged "complaints" with the Director General under Article 92(2) of the Staff Regulations against (1) the decisions of 6 June 1995 assigning them to the office of the Director of the Institute, (2) the decisions not to keep them on at the reformed Institute and (3) the decisions reflected in the Organisation's "wish" to assign them elsewhere. Their "complaints" went to the Joint Committee for Disputes set up under office notice 6/95 of 1 March 1995. In a report of 25 August the Committee took all the cases together and held that the complainants' third claim was irreceivable on the grounds that there was no decision affecting them adversely. The majority recommended allowing their other claims on the grounds that the Organisation had acted unlawfully in basing the procedure of redeployment on Article 7 of the Regulations and Article 8 of Rule No. 2 and failing to apply Article 30 of the Staff Regulations as well for the purpose of filling the vacant posts.

By letters of 11 October and 7 November the Director of Human Resources informed Mr. Boland and Mr. Hardy that they were to be transferred as from 1 January 1996 to Eurocontrol's Experimental Centre at Brétigny-sur-Orge, in France. By a notice of transfer of 17 November the Director told Mr. Hardy that his transfer was to take effect at 1 February 1996. At unspecified dates Mr. Heller, Mr. Olivier and Mr. Rue were informed that they were to be transferred to the Agency's headquarters in Brussels.

By letters of 27 October 1995 — the impugned decisions — the Director informed the complainants that he had decided on the Director General's behalf not to endorse the Committee's recommendations.

B. The complainants submit that the procedure of redeployment was unlawful. Unlike the reforms of 1 January 1993, which gave rise to Judgment 1358 (*in re* Cassaignau No. 3), the new procedure meant both abolishing and creating posts. The Director General was therefore bound under Article 30 of the Staff Regulations to inform the staff of all vacant or new posts, hold competitions and appoint selection boards to consider applications. The team of assessors bore no resemblance to a selection board. Some posts were filled straightaway without any assessment and that amounted to discrimination against staff whose posts failed to survive the reforms. Mr. Hardy pleads unequal treatment on several other counts.

The complainants submit that the Organisation may not by mere reliance on Article 7 of the Regulations evade the requirement in Article 30 of appointing a selection board. Article 8 of Rule No. 2 is unlawful in that it allows the Director General to move someone without a competition to another post at the same grade.

Mr. Boland and Mr. Hardy contend that the decision of 6 June 1995 offends against Article 7 in that it did not assign them to any particular post in the Director's office. The Director General has no authority under the Regulations to order provisional assignment.

The complainants plead breach of trust and improper management. The procedure of redeployment is not provided for in the Regulations and was a hasty and secretive exercise. There is no official version of the paper of 31 January 1995. The Director General disregarded their individual rights.

Lastly, there was breach of due process: the Director General altered the grades of the vacant posts and the qualifications required for them so that he could appoint applicants picked beforehand or remove people from their posts and transfer them away from the Institute.

The complainants ask the Tribunal to quash the decisions of 27 October 1995 confirming the decisions of 6 June 1995; all the decisions putting other staff on posts declared vacant to which they might themselves have been appointed; and the decisions of 14 June 1995 applying to them the fourth phase of the procedure of redeployment. They seek costs.

C. The Organisation replies that the complaints are irreceivable. First, the decisions of 6 June 1995 to transfer them with their jobs did not affect their status in law and so caused them no injury, particularly since at the time Luxembourg was still their duty station. Secondly, their claims to the quashing of alleged decisions appointing other members to vacant posts in their stead are irreceivable because they have not identified any particular decisions of that kind. Thirdly, the letters of 14 June 1995 are not challengeable decisions: they merely stated the Organisation's intention of assigning them outside Luxembourg on completion of the fourth phase of the procedure.

The Organisation's pleas on the merits are subsidiary. As in 1993, when there were reforms at the Institute, in 1995 redeployment consisted in first assigning each staff member with his post to new duties within the new structure. The complainants were transferred to the Director's office but kept their grades and budgetary status. Even though the wording in some documents may have been misleading, vacant posts were not being filled at that stage. There was no breach of Articles 7 and 30; redeployment is an internal measure taken by the Organisation at its discretion for the purpose of restructuring and need not be provided for in the Staff Regulations. The Director General was entitled to assign the complainants provisionally to the Director's office.

The Director General did take account of their individual rights and interests. Their assignment to Luxembourg either on recruitment or later conferred on them no right to remain at that duty station throughout their career at the Agency.

There can be no presumption of abuse of process and the complainants fail to prove that the changes in grades or duties caused them injury.

D. In their rejoinders the complainants rebut the plea that they have no cause of action. The Organisation stripped them of duties and assigned them provisionally and without job descriptions to the Director's office, thus causing them serious moral and professional injury. They did not obtain the remedies provided for in Article 93(4) of the Staff Regulations, which says that a staff member may apply to the Tribunal for a stay of execution of the impugned decision: application for such stay failed because it was not allowed by the Tribunal's own Statute. Article 93(4) is "indisputably misleading" about the remedies actually available to staff.

Enlarging on their pleas on the merits, they deny that the reforms of the Institute were simply internal measures. Posts were created and notices of competition published for many new vacancies at Luxembourg. So the real purpose of redeployment was to get rid of some staff in order to create vacancies and fill them with new recruits.

They seek moral damages.

E. In its surrejoinders the Organisation maintains that the complaints are irreceivable. Assignment to the Director's office caused the complainants no moral injury. Article 93 of the Staff Regulations is not at odds with the Tribunal's Statute. In its surrejoinders to the complaints of Mr. Boland and Mr. Hardy Eurocontrol argues that, though Article VII, paragraph 4, of the Statute says that the filing of a complaint does not suspend the execution of the decision impugned, the Tribunal may derogate from that rule in exceptional cases and entertain an application for suspension. In any event Article 93(5) of the Staff Regulations is plain: "Appeals shall be investigated and heard as provided in the Rules of Procedure of the Tribunal". Besides, the only decisions subject to suspension were the complainants' transfers away from Luxembourg, and they are not at issue. So the complainants may not allege moral injury on that score.

The defendant presses its pleas on the merits.

## CONSIDERATIONS

1. The complainants, who at the material time were on the staff of the Agency's Institute of Air Navigation Services at Luxembourg, are challenging decisions of 27 October 1995 taken on the Director General's behalf confirming:

(a) decisions of 6 June 1995 provisionally assigning them to the office of the Director of the Institute;

(b) decisions rejecting them for posts that had become vacant on the reform of the Institute;

(c) all appointments made to fill those vacancies;

(d) decisions of 14 June 1995 applying to them phase 4 of the procedure of redeployment.

2. The background to the case is as follows. There had been several sets of reforms at the Institute, including some in January 1993, and all had fallen short of what was wanted. After a report by an outside consultant the Committee of Management approved in early March 1994 changes in the Institute's functions and consequent reforms in its structure. On 31 January 1995 the Personnel Directorate told the staff about the plans for the Institute; they included a process of redeployment in four phases: (1) preliminary measures, (2) a process of assessment, (3) redeployment within the Institute, and (4) redeployment elsewhere within Eurocontrol. At a meeting on 24 March the Director of the Institute announced the start of the exercise. On 28 March the complainants got notice of decisions relieving them of their duties and saying that they would be having interviews to assess their fitness for new ones. By a memorandum of 31 March the Director issued a list of vacancies, of which the descriptions were also made available, informing them that the first phase was over and the second one — the interviews — was about to begin. After their interviews the complainants learned on 2 May 1995 that the Organisation had failed to find posts for them in the reformed Institute. Before taking final decisions on redeployment the Director General consulted the Staff Committee on 1 June 1995. On 6 June 1995 the Director General decided to transfer 73 officials, including the complainants, whom he assigned provisionally and without change of grade to the office of the Director of the Institute. By letters of 14 June the Director of Personnel told the complainants that the fourth phase — redeployment elsewhere within Eurocontrol — would apply to them and he invited them to a meeting on 22 June to hear more about it.

3. On 28 June they lodged internal "complaints" purporting to challenge the "decisions" dated 6 and 14 June 1995 and the Director General's "decisions" not to keep them in the reformed Institute. The Joint Committee for Disputes, to which their "complaints" were referred, joined them and reported on 25 August 1995. The majority recommended allowing the complainants' claims in part. By decisions of 27 October 1995, which they are impugning, the Director of Human Resources rejected their "complaints" on the Director General's behalf.

4. Since the complaints rest on the same facts and raise the same issues of law they may be joined to form the subject of a single judgment.

5. Eurocontrol pleads that the complaints are irreceivable on the grounds that the impugned decisions cause the complainants no injury. The effect of the decisions of 6 June 1995 — its argument runs — was to give them provisional assignments in the Director's office within the reformed Institute, without loss of post or detriment to their status; not even their duty station changed. Eurocontrol says that the letters of 14 June 1995 are not decisions at all, let alone final ones, but merely state the Director General's intention of transferring them outside the Institute. And they were signed by the Director of Personnel, not by the Director General.

6. Eurocontrol is right. The letters do not bear the Director General's signature and the gist of them is that the fourth phase is to apply to the complainants and that they may attend a meeting to see where else they can go within the Agency. So none of the letters is a final decision within the meaning of the case law, viz. "an act deciding a question in a specific case" (Judgment 112, *in re* Crapón de Crapona) or "that has an effect on an official's rights and obligations" (Judgment 1203, *in re* Horsman and others). The complainants may still of course challenge any decision that may be taken to assign them elsewhere.

7. They claim the quashing of the Director General's decisions of 6 June 1995 not to put them on posts declared vacant in the reformed Institute and of all appointments to such posts to which they might themselves have been appointed. Eurocontrol contends that those claims are irreceivable. Again it is right. Insofar as they are objecting to the appointments of other staff their claims are irreceivable because they are challenging the status of unidentified third parties.

8. The Director General's refusal to put them on vacant posts was just the logical outcome of the decisions of 6 June 1995 to assign them provisionally to the Director's office. So the lawfulness of the refusal hinges on that of the assignment. And, as is said below, the decisions of 6 June 1995 cannot have affected them adversely or warrant internal "complaints".

9. Whether what they are challenging causes them injury depends on the lawfulness of the reforms at issue. Did the reforms afford all the safeguards that the rules required? The complainants submit that they did not since there was no provision in the Staff Regulations for such reforms and the Director General never formally approved them or gave notice of them to the staff; they were — the argument runs — rushed through and constituted misuse of authority and abuse of process.

10. For one thing, structural reform is at an organisation's discretion: see Judgment 526 (*in re* Puel) under 3 and 4. For another, as was said in 2 above, the Committee of Management approved the reforms and the Director of the Institute duly informed the staff on 24 March 1995. Thirdly, there is no evidence to suggest that redeployment impaired the complainants' status.

11. On this last issue Eurocontrol observes that the provisional transfers of 6 June 1995 to the Director's office kept each of them at the same grade and on the same budgetary post. The complainants scarcely challenge what the defendant says on that score. Instead they make much of the creation of posts and the need to fill them as prescribed in the Staff Regulations. Yet by a memorandum of 3 April 1995 the Director announced that any post still vacant once redeployment was over would be advertised and filled in the normal way. So, although Eurocontrol redeployed the complainants along with the others transferred on 6 June 1995, they were still free to apply later for one of the new posts when notices of vacancy went out in keeping with the prescribed procedure. At all events there is no evidence to suggest that the reforms constituted any misuse of authority.

12. The conclusion is that the complainants' provisional transfers observed their prescribed rights and afford no cause of action, and that the complaints are irreceivable.

## DECISION

For the above reasons,

The complaints are dismissed.

In witness of this judgment Mr. Michel Gentot, Vice-President of the Tribunal, Mr. Edilbert Razafindralambo, Judge, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 30 January 1997.

*(Signed)*

MICHEL GENTOT E. RAZAFINDRALAMBO EGLI

A.B. GARDNER

*Registry's translation,
the French text alone
being authoritative.*

## EIGHTY-SECOND SESSION

***In re* Echeverría Echeverría,
García Ramírez, Julien Urzúa
and Tapia Rojas**

**Judgment 1616**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Mr. Owen Echeverría Echeverría, Mr. Roberto García Ramírez, Mr. Rubén Julien Urzúa and Miss Victoria Tapia Rojas against the European Southern Observatory (ESO) on 10 January 1996, the Observatory's single reply of 14 April, the complainant's rejoinder of 17 May and the ESO's surrejoinder of 23 July 1996;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which none of the parties has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainants used to be members of the ESO's local staff in Chile. It recruited them between 1967 and 1977 for employment at its astronomic observatory at La Silla, in the Andes. Miss Tapia Rojas was in the Technical Research Support Department (TRS) at grade "A5+15". The other complainants were in Maintenance and Construction (M & C): Mr. Echeverría Echeverría was a "labourer" at grade "A2+15", Mr. García Ramírez an administrative assistant at "B1+9" and Mr. Julien Urzúa a site supervisor at "B1+17".

By letters of 15 September 1995 the ESO's Administrator in Chile told them that their posts were to be abolished at 16 September 1995 in the context of reforms to be made for budgetary reasons in the ESO's operations there and that their appointments were to end at 15 September 1995 under Articles LS II 5.03 and 5.04 10 of the Regulations for ESO Local Staff in Chile, viz. "for reasons determined by the functional necessities of the Organisation".

They claimed reinstatement but the Director of La Silla refused in letters he sent them on 26 and 31 October 1995. They appealed to the Director General. The acting head of Administration rejected their appeal on the Director General's behalf by letters dated 15 December 1995, observing that it was not "appropriate" to put their cases to a board under Article LS VI 1.08 of the Local Staff Regulations. Those are the decisions under challenge.

B. The complainants contend that the decisions they are impugning are unlawful. They plead procedural and substantive flaws. In their submission the ESO failed to observe its rules on notice, on assignment to other duty stations and on consultation of the Joint Advisory Appeals Board. They dispute the ESO's reasons for getting rid of them and contend that its treatment of them was arbitrary. Miss Tapia Rojas further pleads sexual discrimination.

Each of them seeks the quashing of the decision impugned and reinstatement as from 15 September 1995 or, failing that, damages on all counts in an amount equivalent to five times "total gross remuneration" for the period from 15 September 1994 to 15 September 1995, plus interest to be reckoned at the rate of 12 per cent a year from the date of filing the complaint. Mr. Julien Urzúa further claims the payment of service indemnity taking into account his "full" 28 years' service. They claim costs.

C. The ESO contends that the complaints are devoid of merit. It describes the changes that occurred in conditions at La Silla over the years and that made the complainants' services disposable. Although it was to have a new site elsewhere in the Chilean Andes, at Cerro Paranal, it had no work to offer them there either. It denies committing any procedural mistakes and says that the complainants have misread the material rules.

D. In their rejoinder the complainants rebut the Observatory's reply, enlarge on their pleas and press their claims.

E. In its surrejoinder the Observatory maintains that the impugned decisions show none of the procedural or substantive flaws the complainants plead.

## CONSIDERATIONS

1. The complainants used to hold permanent appointments with the ESO as local staff at its astronomic observatory at La Silla, in Chile. On 15 September 1995 they each got letters announcing the immediate abolition of their posts and the consequent termination of their appointments under Article LS II 5.04 of the Regulations for ESO Local Staff in Chile, which allows termination owing to the "functional necessities of the Organisation".

They lodged appeals first with the Director of La Silla and then with the Director General. But letters dated 15 December 1995 told them that the Director General had rejected their appeals. Those are the decisions they are impugning.

2. Their complaints raise similar issues and so may be joined to form the subject of a single judgment.

3. The complainants put forward one plea on the merits and three on issues of procedure. On the merits they submit that their dismissal was unlawful on the grounds that the abolition of their posts was in breach of contract and there was no "functional necessity" to replace permanent with part-time or short-term staff. Their procedural objections are breach of the rules on notice, breach of the ESO's duty to try to reassign staff on posts that are to be abolished, and breach of the Director General's duty to consult the Joint Advisory Appeals Board before deciding on an appeal.

4. The Tribunal need not rule on the merits since it upholds some of the procedural objections.

5. It is satisfied on the evidence and from the wording of the decisions of 15 September 1995 that, indefinite appointments notwithstanding, the complainants were dismissed without notice. The letters informing them of termination said that the Observatory was abolishing their posts on the morrow and so ending their contracts on 15 September, the very date that the letters bore. Though the ESO was to let them have a month's pay in lieu of the notice due under Article LS II 5.03, that did not meet the requirement of notice. The mere remittance of pay does not meet that requirement unless the parties to the contract of service agree that the employee should not work out the period of notice or the organisation puts him on special leave during that period. Failing those exceptions the employee must be given actual notice so that he may make proper arrangements for leaving and possibly look for another job. It is inadmissible that any official, let alone an established one, should be told of dismissal on the very day on which it takes effect and left to his own devices without further ado. There is no doubt some merit in the Observatory's statement that the complainants had for long been aware of the threat that the reforms planned at La Silla posed to their own jobs. But it is not admissible in law that they should be denied the month's notice the rules required, even though, as has been said, they were paid in lieu.

6. A further flaw in the impugned decisions is that they did not follow the referral to the Joint Board that Article VI 1.03 of the ESO's Combined Staff Rules requires. That provision says:

> "... appeal shall be made first to the Director General, who, before taking any decision on its substance, shall consult a Joint Board whose composition shall be defined in the Regulations."

The defendant does plead on that score that the Local Staff Regulations, which the Director General issued under Articles I 1.03 and I 1.04 of the Combined Staff Rules, differ from the rules that apply to international staff in that they merely empower, and do not require, him to set up an advisory board to report on claims and appeals by local staff. The ESO argues that in deciding not to consult a board — or apparently even to set one up — the Director General was exercising the discretion that an earlier judgment of the Tribunal's acknowledged he had. But the plea does not hold water. The provisions of the Combined Rules apply to international and local staff alike, and so any provision that applies to one category of staff and not to the other offends against those Rules and is unlawful. Here the Director General had no authority to treat as a mere option the consultation of the joint board on appeals from local staff: the Combined Rules apply to all staff and so does the duty those Rules lay down. The rule under which the Director General exercised discretion was an unlawful one and he thereby committed a mistake of law. Again the complainants' plea succeeds. The reason why the Tribunal came to another conclusion in Judgment 872 (*in re* Yagnam Vigorena) is, as it said in that text, that there the complainant had not pleaded the unlawfulness of the local rule.

7. There is therefore no need to take up the complainants' plea that, having abolished their posts, the Observatory failed in its duty to try to find other suitable jobs for them. That is just one of the issues that the joint board would have entertained had it ever met.

8. The conclusion is that the ESO failed to observe the proper procedure, that the impugned decisions of 15 December 1995 cannot stand and that the cases must be sent back for due decisions on the appeals. The complainants are, however, entitled, not to the reinstatement they claim, but merely to review of their status. They are further entitled to awards of damages in amounts equivalent to what they would have earned from 15 September 1995 up to the dates at which decisions are duly taken on their appeals, less any indemnities the ESO may already have paid them.

9. For Mr. Julien Urzúa, who reached the age of retirement on 20 September 1996, the amount of damages shall be equivalent to what he would have earned up to that date. Moreover, there is no merit in his claim to further terminal entitlements on the strength of the contract that he signed in 1967 and that was governed by the law of Chile: the applicable law under the

terms of his appointment as amended in 1972 is the ESO's own rules, and those are the rules that have been applied to him.

10. The complainants are entitled to costs. The amount is set at 1,000 United States dollars for each of them.

## DECISION

For the above reasons,

1. The Director General's decisions dated 15 December 1995 and those of 15 September 1995 on the cases of the four complainants are set aside.
2. The cases are sent back to the Director General for due decisions on the appeals.
3. The Observatory shall pay them the awards as set out in 8 and 9 above.
4. It shall pay each of them 1,000 dollars in costs.
5. Their other claims are dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Michel Gentot, Vice-President, and Mr. Edilbert Razafindralambo, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 30 January 1997.

*(Signed)*

WILLIAM DOUGLAS MICHEL GENTOT E. RAZAFINDRALAMBO

A.B. GARDNER

*Registry's translation,*
*the French text alone*
*being authoritative.*

## EIGHTY-SECOND SESSION

***In re* Lebtahi** **Judgment 1617**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs. Farida Nadia Lebtahi against the World Health Organization (WHO) on 20 November 1995 and corrected on 19 December 1995, the WHO's reply of 20 March 1996, the complainant's rejoinder of 24 June and the Organization's surrejoinder of 1 October 1996;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, an Algerian who was born in 1948, joined the WHO on 9 May 1983. She held a one-year appointment as a part-time technical officer at grade P.3 in the Division of Vector Biology and Control. She had her appointment extended by one year at a time and then, from 1989, by two years. From 1990 she worked full time and the WHO put her in charge of its scheme for the evaluation of pesticides (WHOPES). On 1 April 1992 she was granted a personal promotion to P.4 as a scientific expert. At the material time she was working in the Division of Control of Tropical Diseases (CTD). In May 1993 the WHO transferred her from Operational Research to Schistosomiasis Control within that division.

On 21 October 1994 she signed a report on her performance in a period ending on 31 March 1994. By a memorandum of 26 October 1994 the Director of CTD proposed in the light of the report that the Personnel Division should renew her appointment for just one year, until 31 December 1995. On 5 December 1994 she signed a form renewing her appointment for one year but reserved her "right to appeal and seek a two-year appointment". On 13 December 1994 the Director of the Personnel Division extended her appointment by one year.

On 17 February 1995 she gave the headquarters Board of Appeal notice of appeal against the decision of 13 December 1994. She entered a brief on 14 March 1995 asking the Board to declare the decision of 13 December unlawful and to recommend that the Director-General give her a five-year extension and transfer her to another department. In its report of 24 July the Board recommended rejecting the appeal. By a letter of 22 August 1995 to the complainant — the impugned decision — the Director-General endorsed the Board's recommendation.

By a letter of 28 September 1995 the Chief of the Administration and Staff Support Service told her that her appointment would not be extended beyond 31 December 1995.

B. The complainant submits that according to Staff Rule 1050.3 the WHO should have told her of the one-year renewal at least three months before the expiry of her appointment, i.e. by 1 October 1994 at the latest. It did so only on 13 December, 18 days before expiry. So she assumed that it was tacitly renewed on 1 October 1994 for a further two years.

She pleads several flaws in the appraisal of her performance. First, her supervisors gave her only two reports in the five years from 1 January 1990 until the date of filing this complaint. That was in breach of Staff Rule 530.2, which requires at least one report a year. Secondly, the report on her work in the period up to 31 March 1994 is flawed because it is incomplete, omitting as it does any assessment by her first-level supervisor. Lastly, the Organization failed to update the description of her post as Article 50 of the WHO Manual requires.

She submits that the impugned decision is unlawful since it overlooks material facts. In the report on her performance up to 31 March 1994 the Director of CTD said that she had managed WHOPES poorly. That that was untrue may be seen by comparing how the programme fared before and after she took over. The Organization ignored the fact that she was promoted to grade P.4 on 1 April 1992. There is no truth in other charges about her performance, such as lateness in drawing up her programme of work for 1994-95, failure to attend official meetings and poor working relations with secretaries. The impugned decision is therefore based on clearly mistaken conclusions.

Lastly, the Organization misused its authority and offended against the principle of equal treatment by refusing, for all her requests, to transfer her and WHOPES to another unit in the CTD or to another division.

She seeks a five-year extension of appointment, her transfer, together with responsibility for WHOPES, to another division, an award of damages equivalent to six months' pay and 12,000 Swiss francs in costs.

C. In its reply the WHO submits that the report on the complainant's performance up to 31 March 1994 was "very bad". She was the only programme officer not to have her work plan for 1994-95 ready in time. The report shows that behind her supervisors' backs she tried to get WHOPES transferred to another division. It was quite wrong for her to try, for her own sake, to find a department where she thought working conditions would be better.

The decision to renew her appointment for only one year came after thorough appraisal of her work and conduct. A one-year extension, which the WHO Staff Rules and Manual and her contract allowed, was warranted in the circumstances. Paragraph 550.1 of the Manual says that extension is subject to a finding of satisfactory performance. She was promoted to P.4 only because her post was to be upgraded.

Staff Rule 1050.3 prescribes a period of notice where termination is due to abolition of a post. The material rule in her case is Rule 1040, and it does not require three months' notice where an extension is shorter than the current appointment.

The WHO acknowledges that it appraised her performance in 1992-94 only once and that her first-level supervisor should have made an entry in the report she signed on 21 October 1994. But those omissions have no bearing on the merits of the case, since the impugned decision rested on comprehensive assessment of her work and conduct. As for the delay in updating the description of her post, it was partly her own fault.

D. The complainant rejoins that in its report of 24 July 1995 the headquarters Board of Appeal recommended against ruling out a transfer and in favour of updating the post description so that her work could be objectively assessed. She points out that the consultant who took over from her was transferred with WHOPES to another unit. Citing Judgment 469 (*in re* O'Connell), she challenges the narrow construction that the WHO puts on Rule 1040.

E. In its surrejoinder the WHO maintains that the impugned decision was based on the complainant's reports, which show her many difficulties both in work and in getting on with others. She was given a one-year extension so that she could do better and her second-level supervisor could assess her work.

WHOPES was brought directly under the CTD Division in July 1996. Judgment 469 is irrelevant.

## CONSIDERATIONS

1. The impugned decision is about the extension of a fixed-term contract by a period shorter than that of the current appointment. Since at the expiry of that appointment there might have been no extension granted at all, the rules on non-renewal apply *mutatis mutandis*: see Judgment 1526 (*in re* Baigrie) on the grant of a shorter extension without further renewal.

According to WHO Staff Rule 1040 a fixed-term appointment confers no right to renewal. A firm line of precedent has it that a decision not to renew is discretionary and may be set aside only if it is *ultra vires* or in breach of a formal or procedural rule, or if there is a mistake of fact or of law, or if some material fact is overlooked, or if a plainly mistaken conclusion has been drawn from the evidence, or if there is misuse of authority.

An international organisation accordingly has broad discretion in deciding whether to renew a fixed-term appointment. Having only a limited power of review, the Tribunal will not interfere in the organisation's assessment of someone's fitness for service or career prospects: see, for example Judgment 1349 (*in re* Zago) and the case law cited therein.

2. The complainant pleads that the Organization failed to tell her by 30 September 1994, i.e. within three months of the date of expiry of her then appointment, that it intended to offer her only one more year and that there was therefore tacit renewal of her two-year appointment to 31 December 1996. The three-month limit is, she argues, set in Rule 1040 on non-renewal and in Rule 1050.3 on termination before expiry. In her submission the law of contract, which implies renewal in such circumstances, should apply by analogy. She relies on Judgment 469 (*in re* O'Connell), a case where an official had been given notice of a two-month extension only two days before expiry of the contract: the effect of failure to give notice — the Tribunal held in 3 — could "only be that the contract is by implication renewed for another term". So it was unlawful for the impugned decision to reduce a period of extension already granted by implication.

The WHO's answer is that it complied with the material rules. Notice is, it maintains, required only in the event of termination or non-renewal since only then does an official need time in which to put his affairs in order; the rules do not recognise renewal by implication; there must be an express decision saying, for one thing, how long the extension is to be; and, if there is a short extension and then none at all, due notice will then be given.

The Organization's reasoning is sound. The rule of contract law about implied renewal of a fixed-term appointment cannot apply by analogy to the international civil service, where contractual relations are determined by individual written decisions. Whether the case is one of non-renewal or of dismissal, the rules on notice must be observed: so say the precedents. The need for such a safeguard is ordinarily not so great when the appointment is extended, but extended by a shorter term than the current one. The official is of course entitled to be told promptly what the organisation intends so that he can make up his own mind about its offer. If he accepts he will have protection enough from the notice to be given later if a decision is taken not to renew his appointment. He is protected too if there are offer and acceptance of extension but he still appeals in order to get a longer term. But if he refuses an offer of extension and wants to seek employment elsewhere he will again need time. In that event equity may require an extension from the date of the offer by a period as long as the required notice. That would take account of the parties' legitimate interests in a way that the extraordinary implication of extension by the same term does not.

But there is no need to rule on that issue here: the complainant did not want to leave the WHO but was merely asking for a longer extension. In the event of non-renewal she has the protection of the required notice.

Her plea fails.

3. (a) The reason the Organization gave for the impugned decision is that her performance was unsatisfactory. That emerged in the report appraising her performance in the period up to March 1994 but had already been apparent to some extent even before. In sum, she allegedly fell short of expectations, failed to produce the documents her supervisors had asked for and got on poorly with secretaries and others. The Administration's reason for extending her appointment by only one year was to give her time to come up to par.

She is objecting to those strictures as mistaken in fact. She says that most of her supervisors lacked the scientific training to assess her as an entomologist. She challenges the validity of her final appraisal on several grounds. She alleges breach of Rule 530.2, which requires the administration to report on her performance at least once a year. She says that, in breach of Manual paragraph 50, her first-level supervisor did not make a single appraisal on her performance from 1 January 1992 to 31 March 1993 and, in breach of paragraphs 40 and 50, the Organization failed to update the description of her post. So, she submits, it may not rely on the final appraisal. It allegedly overlooked such material facts as the personal promotion she got in June 1992 to P.4: that, she maintains, shows that her work was good and gives the lie to the utterly different appraisal for the full period.

As the Appeals Board observed, she failed to challenge the charge that she had been unable to work satisfactorily. Instead she blamed the unfavourable conditions in which she had to work and the lack of support from her supervisors and of proper secretarial help.

(b) The WHO admits the flaws she points out but maintains that none of them is fatal to the impugned decision.

The case law she cites does not bear out her contention that the substantive decision was tainted with procedural flaws. The Organization submits that the material issue is whether the flaws went to the substance of its decision. In Judgment 448 (*in re* Troncoso) the Tribunal held that, although procedural flaws might sometimes be corrected in the course of internal appeal proceedings, for example by the disclosure of evidence, that ordinarily proved impossible when there had been no prior report at all. In this case the reporting procedure was followed and the complainant was given her say. Though there may not have been reports at least once a year as required, the report on the final reporting period is no less lawful on that account. It is true that her first-level supervisor did not report on her work, before she was transferred, though he ought to have done so: see Judgments 10 (*in re* Marsh) and 197 (*in re* Sternfield). Yet the report on the rest of the period holds good, and the period was long enough to allow proper appraisal. So the hearing of her first-level supervisor by the Board of Appeal was a proper way of correcting the procedural flaw. Indeed the complainant fails to offer any cogent reason why it was not. The conclusion is that the flaws she objects to under this head are not fatal to the impugned decision.

(c) It is odd that the WHO granted her a personal promotion to P.4 in the spring of 1992 when she thereafter got bad reports. The Organization explains that the proposal for that promotion came from the Personnel Division, not from her own supervisors, the purpose being to make her pay match the level of attainments her post demanded.

In any event her supervisors knew of her promotion when they appraised her performance and the Director-General too must have been aware of it when he took the decision. Besides, her work may have gone into decline since then and so warranted a poor report.

The conclusion is that on that score the Director-General did not neglect any material fact.

(d) Not having the same training in entomology as she, some of her supervisors no doubt found it hard to appraise her work in that area. Yet they were still competent to say how she was meeting the Organization's requirements and, in particular, comment on her relations with others at work and, at least to some extent, on what she had achieved.

Their lack of such training does not in itself cast doubt on their appraisals.

(e) Although she did admit to the Board of Appeal that she had some shortcomings she otherwise denies the WHO's criticisms of her performance.

The WHO may rely, however, mainly on the concurring views of some of her supervisors and the opinion expressed by the Board after hearing both parties and several witnesses. The witnesses said that her relations with others at work had been especially strained and that she had failed to cope with the problems due to cuts in secretarial staff.

On the strength of the unfavourable appraisal non-renewal of her appointment may have seemed too harsh for someone who until then had had good reports which offered hope of improvement. So the WHO concluded that the right expedient was to give a shorter extension so that she might show her mettle.

In coming to those conclusions on the evidence before him the Director-General did not go beyond the bounds of his discretion and the Tribunal will not replace his assessment of the evidence with its own. Giving her a renewal for one year — instead of none at all — allowed for the fact that had her appraisal reports been more frequent (see (b) above) her shortcomings might have come to light sooner and she might then have been able to show improvement before the normal expiry of her contract.

4. In her comments on her appraisal report she applied for transfer to another unit. When the Organization granted her the one-year extension it did not expressly comment on that request. Again she asked the Board of Appeal to recommend that the Director-General transfer her to another unit. The Board did not comment either. She now argues that the Organization's failure to transfer her amounted to misuse of authority and breach of equal treatment.

So has the Organization taken a decision on her application for transfer and has she exhausted her internal remedies? If she were objecting to the WHO's failure to transfer her when it extended her appointment, the plea is devoid of merit, since the matter is at the Director-General's discretion.

But there is no need to rule on the issue. Rejection of a claim to transfer, or failure to take a decision on it at the time of renewal, is a matter for the Director-General's discretion. It would in any event have been admissible for him to hold over a decision on the issue until he had further information on her performance, on the scope for transfer and on the usefulness of transfer for the Organization. Since she had already been transferred, with her own consent, in May 1993 there was all the more need for such information: on that issue see Judgment 451 (*in re* Dobosch) under 12.

The plea is devoid of merit.

5. Since her main claims fail, so do her claims to damages and costs.

## DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Edilbert Razafindralambo, Judge, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 30 January 1997.

*(Signed)*

WILLIAM DOUGLAS E. RAZAFINDRALAMBO EGLI

A.B. GARDNER

*Registry's translation,*
*the French text alone*
*being authoritative.*

# EIGHTY-SECOND SESSION

***In re* Baillet (No. 2), Boeker, Bousquet, Cervantes (No. 2), Criqui, Kagermeier (No. 3) and Raths (No. 3)**

**Judgment 1618**

THE ADMINISTRATIVE TRIBUNAL,

Considering the common complaint filed by Mr. Bernard Jean Raymond Baillet (No. 2), Mr. Jean-Pierre Cervantes (No. 2), Mr. Jean-Jacques Criqui and Mrs. Ingrid Maria Kagermeier (No. 3) against the European Patent Organisation (EPO) on 30 August 1995 and corrected on 24 November 1995;

Considering the common complaint filed against the Organisation by Miss Ruth Boeker, Mr. Karl Bousquet and Mr. Gaston Raths (No. 3) on 14 September 1995 and corrected on 24 November 1995;

Considering the EPO's single reply on 7 March 1996, the complainants' rejoinder of 12 June and the Organisation's surrejoinder of 5 August 1996;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which none of the parties has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainants are permanent employees of the European Patent Office, the secretariat of the EPO. At the material time they were staff representatives.

At a meeting on 29 April 1992 the President of the Office told the chairmen of the staff committees from the Office's duty stations that he would be asking the EPO's Administrative Council to approve rules to allow the employment of staff under fixed-term contracts. He intended, he said, to consult the General Advisory Committee (GAC) so that he could put proposals to the Council in December 1992. The staff representatives expressed reservations about the sort of contracts he had in mind.

By a letter of 16 November 1992 the chairman of the Central Staff Committee, Mr. Bousquet, asked the President of the Office to remove his proposals from the Council's agenda or, failing that, treat his letter as an internal appeal.

At its 46th Session, which it held from 8 to 11 December 1992, the Council adopted the President's proposals with amendments. The relevant paper was CA/D 15/92 of 11 December 1992.

In a letter of 8 January 1993 the Director of Staff Policy informed Mr. Bousquet that the President had rejected his request and referred it to the Appeals Committee. By a letter dated 17 February Mr. Bousquet told the President that his appeal was also against the carrying out of the Council's decision. From 17 February to 9 March 1993 the other complainants too filed appeals against that decision. In a report dated 30 March 1995 a majority of the Appeals Committee held that the GAC had not received ample information from the Administration and recommended referring the matter to the GAC. The minority recommended rejection.

By letters of 30 May 1995, the impugned decisions, the Director of Staff Policy notified the President's rejection of the appeals.

B. The complainants say that they are acting as permanent employees of the Office, staff representatives or members of the GAC.

They submit that the EPO failed to observe several formal requirements before bringing in the new rules and thereby showed unwillingness to consult in good faith. The time it gave the GAC was too short for it to draw up a reasoned report. The matter was not as urgent as the President made out. The EPO took on few "contract staff" in the year after the introduction of the new rules. Its refusal to let the staff representatives have the information they needed, such as a legal opinion on the new rules, seriously hampered the work of the joint advisory committees. On essential issues it did not consult the GAC at all. The chairman of that Committee revealed bias by having an article of his published in the EPO *Gazette* in support of the new arrangements before the members of the Committee had discussed the matter.

There was no proper consultation and many important issues were left unanswered. The European Patent Convention (EPC) does not empower the Administrative Council to extend the scope of the Service Regulations and the pension scheme by amendment. It is wrong to fob off permanent duties on contract staff. Article 20 of the Protocol on Privileges and Immunities provides for cooperation between the authorities of contracting parties and the EPO in the area of labour law, among others. But the Office did not find out what the law in member countries said about fixed-term appointments and so cannot have taken it into account. The new rules were improperly rushed through. The Administrative Council declared the Protocol applicable to contract staff, a decision at odds with one it had taken on 20 October 1977 about Articles 14 to 16 of the Protocol.

Conflict between the rules on conditions of employment for contract staff and the Service Regulations is detrimental to the interests of the complainants both as staff members and as staff representatives. Under Article 35 of the Regulations the Staff Committee is elected by permanent employees alone and by no one else. Staff representatives may not take part in the procedure for recruiting contract staff, and that is a serious breach of their acquired rights. Since contract staff may participate in the EPO's pension and health funds the premiums of permanent employees will go up. The recruitment of contract staff on permanent posts limits the prospects of promotion for permanent employees. One acknowledged purpose of the new rules is to release the EPO from the constraints of labour law in member countries. The President of the Office and the Administrative Council did not keep their promise to explain just when the EPO might be granting fixed-term appointments.

The complainants want the Tribunal to (1) declare the Council's decision CA/D 15/92 of 11 December 1992 to be inapplicable; (2) order the President of the Office to ensure that contract staff, who have accepted offers of employment in good faith, suffer no material injury on that account; and (3) award 10,000 German marks in moral damages and 15,000 marks in costs.

C. In its reply the EPO rebuts their arguments. In its submission the chairmen of the staff committees at the various duty stations got full information on the proposed terms of service for contract staff. The members of the GAC were able to examine in good time the salient points of the proposals.

Under Article 33(2)(b) and (c) of the Convention the Administrative Council is competent to amend the Service Regulations and the Pension Scheme Regulations. So it is free to extend their coverage to other categories of staff. Again, under Article 17 of the Protocol on Privileges and Immunities, the Council may decide which categories of staff particular provisions of the Protocol are to apply to.

The EPO consulted the GAC according to the proper procedure. There was nothing wrong in the President's setting a deadline for its report. Though only a few contracts were issued the President was quite right to say that the matter was urgent: other schemes of recruitment were not enabling the EPO to find all the staff it needed, and it had to take on fixed-term staff for the purpose. There was no bias in the article in the *Gazette*: it gave an objective review of what were at the time still just proposals. Besides, the rules do not require members of the GAC to be impartial. As to the alleged lack of a legal opinion, the chairman of the GAC was none other than the head of the Legal Department and so was able to answer the other members' questions.

The Administrative Council is competent to amend the Service Regulations so as to enable the Staff Committee to represent further categories of staff. Other international organisations with several categories of staff commonly have a single staff committee to represent them all. Otherwise, being such a small percentage of total staff, contract staff would have no-one to represent them. In any event the complainants may not plead any acquired right to take part in the recruitment of contract staff. Whenever a contract is extended up to a cumulative duration of over three years the procedure for recruitment entails consultation of staff representatives.

Since there is no telling how many contract staff will be recruited and how many will want to join the EPO's pension and health funds, it is hard to gauge the effects that the new rules will have on those funds.

As for career prospects, there will obviously be few contract staff and by the very nature of their contracts they will not be taking over work that could and should go to permanent employees.

So neither as staff members nor as staff representatives have the complainants suffered any injury, and their complaints are accordingly irreceivable.

D. In their rejoinder the complainants press their pleas. In the light of the defendant's reply they submit that since the Council's decision amounted to legislative reform it warranted better preparation and fuller information and consultation. The reply confirms that there was nothing urgent about the new scheme. The complainants say that what they are objecting to is not so much the creation of a new category as the implied amendment of the Service Regulations.

E. In its surrejoinder the EPO says that the rejoinder raises no new issue that in any way causes it to alter its stand.

## CONSIDERATIONS

*The facts*

1. On 11 December 1992 the Administrative Council of the EPO adopted a decision — CA/D 15/92 — setting out conditions of service for contract staff.

The draft had earlier aroused opposition from permanent employees of the Organisation. Several of them, acting as members of staff committees or of the General Advisory Committee (GAC), asked the President of the European Patent Office to reverse the Council's decision on the grounds of procedural flaws and breach of their substantive rights.

The President referred their claims to the internal Appeals Committee. The majority of the Committee recommended treating their claims as receivable and allowing them in part; two of its members issued a minority report which recommended dismissing their claims as irreceivable and in any event devoid of merit. By the decisions under challenge the President endorsed the recommendation of the minority.

The complainants have filed suit both as permanent employees and as representatives of staff committees or as members of the GAC. They seek the quashing of the Administrative Council's decision on the grounds both of flaws in the procedure for consultation and of substantive flaws.

2. They sum up their pleas as follows in their rejoinder:

> "Procedural flaws and the lack of consultation on several important issues meant that there was no proper consultation.
>
> The Administration tampered with the Service Regulations both in substance (Staff Committee and social contributions) and in form (failure to put through express amendments).
>
> The purpose of the new rules is to evade the requirements of labour law in member countries.
>
> The President broke a promise in that there is no decision of the Council's explaining what sort of work contract staff would be doing."

The Organisation demurs. It says that there was proper consultation; that the staff representatives had all the time and information they needed to make up their minds; constructive proposals from them made for worthwhile changes in the draft and final texts; and the President kept his promise to explain what sort of jobs contract staff would be doing. On the merits the EPO submits that the rules on contract staff are in keeping with general principles of law and do not harm the interests of permanent employees.

3. The complainants are challenging the Council's decision both on procedural grounds — for lack of proper consultation of the staff — and on the merits — for failure to comply with general principles of law. The Tribunal will take up the issues of receivability and the merits separately.

*Receivability*

4. What the complainants are challenging is a legislative act that is general in thrust.

In keeping with Article VII of its Statute the Tribunal will declare a complaint against a general decision receivable when it is itself subject to internal appeal. But when it needs to be put into effect by individual ones the complaint to the Tribunal will be irreceivable: see Judgments 624 (*in re* Giroud No. 2 and Lovrecich), 625 (*in re* Desmont and Gagliardi), 626 (*in re* Giroud No. 3 and Caspari), 1081 (*in re* Albertini and others) under 4, 1134 (*in re* Ngoma) again under 4, 1329 (*in re* Ball and Borghini) under 5 and 6 and 1520 (*in re* López-Lahesa Nos. 1 and 2 and others) under 5 to 7.

Thus Judgment 1451 (*in re* Hamouda and others) — see 19 to 21 — said:

> "... the staff member need not ordinarily impugn at once a general decision he believes has caused him injury but may, without any risk of being time-barred, wait until the general decision affects him in the form of an individual one."

In those cases, which were about a change of jurisdiction over disputes about pensions, the Tribunal further held that -

> "... every staff member has an actual and present interest in having light shed on the matter. The Tribunal affords guarantees of a system of international law ... It would ... be wrong to deny the staff the right of appeal on the grounds that the impugned decision is general in purport ... The conclusion from the foregoing is that in the circumstances [the objection to receivability] must fail."

The Tribunal therefore declared the complaint against the general decision to be receivable.

5. In this case the complainants set out their objections in an internal appeal that the President of the Office referred to the Appeals Committee. For the same reasons as those stated in Judgment 1451 the present complaints are receivable. What is at issue is not a general decision setting out the arrangements governing pay or other conditions of service. Such arrangements take the form of individual implementing decisions that each employee may eventually challenge, say about his pay, or pension, or the amounts of contributions from employer or employee. What is at issue here is the adoption of rules on the employment of contract staff that may have indirect effects on the status of permanent employees as to their pay — if they have to bear a

heavier financial burden — or as to their indirect involvement in the framing of EPO policy through the participation of staff representatives in advisory bodies. The outcome of the case is of foremost concern to third parties, namely the contract staff themselves, who have an obvious interest in knowing whether the rules that govern their employment are lawful. For the sake of efficient management, too, the Organisation plainly needs a prompt ruling on such fundamental issues.

On that score the complaints are receivable.

6. The complainants say they are acting as permanent employees, as members of the staff committees and as members of the GAC.

Citing Judgment 1147 (*in re* Raths) under 3 and 4, the defendant does not dispute their *locus standi* insofar as they are indeed entitled to represent the staff.

That ruling on the receivability of a complaint holds good, there being no need to determine whether any employee would have the same right in a case about rules calculated to safeguard the interests of the staff at large.

So the complaints are receivable on that score as well.

7. Another condition of receivability is that the impugned decision must cause the complainant some injury: there must be a real and present cause of action.

The EPO contends that that condition is not met here on the grounds that the grant of fixed-term appointments to contract staff causes its permanent employees no injury.

Yet that is just what is at issue, and the Tribunal will, when it comes to the merits, entertain their contention that they have suffered injury.

Besides, when a complainant is challenging a general decision that takes the form of a rule, he will have a cause of action provided that there is even a risk that the implementation of that rule may cause him injury. That again was the *ratio* of Judgment 1451, which held that even where the decision was general the complainant might have a real and present cause of action.

Since the future application of the conditions of service of contract staff may indeed affect the complainants' status, the conclusion is that their complaints are receivable.

## The merits

### *The procedure for consultation*

8. The complainants plead breach of their right to be consulted before adoption of the rules on contract staff.

Article 38 of the Service Regulations, which is headed "Joint Committees", reads:

> "(1) The joint committees shall consist of:
> - a General Advisory Committee,
> - Local Advisory Committees.
>
> (2) They shall comprise:
> - a Chairman who shall be appointed each year by the President of the Office and who shall not vote save on procedural questions;
> - members and alternates appointed at the same time in equal numbers by the President of the Office and by the Staff Committee.
>
> (...)
>
> (3) The General Advisory Committee shall, in addition to the specific tasks given to it by the Service Regulations, be responsible for giving a reasoned opinion on:
> - any proposal to amend these Service Regulations or the Pension Scheme Regulations, any proposal to make implementing rules and, in general, except in cases of obvious urgency, any proposal which concerns the whole or part of the staff to whom these Service Regulations apply or the recipients of pensions;
> - any question of a general nature submitted to it by the President of the Office;
> - any question which the Staff Committee has asked to have examined and which is submitted to it by the President of the Office in accordance with the provisions of Article 36.
>
> (...)
>
> (5) Opinions of the joint committees which are required in respect of administrative decisions must be delivered within the time limits laid down in each case by the President of the Office, such time limits being not less than fifteen working days. Once the time limit has expired, the opinion shall no longer be required."

In Judgment 1062 (*in re* Hofmann No. 2) the Tribunal held in 5:

> "Consultation in the context of Article 38 entails giving the GAC enough information to enable it to come to 'a reasoned opinion'. Merely telling it that the Administration would give it more details and provide data on the negotiations if it so wished did not comply with Article 38, which is plainly intended to make for proper consultation between the two sides."

The case that Judgment 1291 (*in re* Hofmann No. 3) ruled on was about the same article. The GAC decided against making a recommendation on the grounds that it had not had the information it needed to do so; but the Tribunal found no evidence of any procedural flaw: inasmuch as the Committee had had "the relevant available information" the Administration had at the material time discharged its duty under Article 38(3). Judgment 1200 (*in re* Kheir, Münster and Turco) was about a similar rule in another organisation. There the Tribunal held in 2:

> "What [the rules on consultation] plainly require is co-operation between staff and management. Though it is not to take the form of bargaining, there must be a real exchange of views, and if it is to work both sides must show good faith."

9. The complainants plead a procedural flaw. The gist of it is that some time late in July or early in August of 1992 the Committee's chairman had an article published in the house *Gazette* advocating the very proposals the complainants took issue with and that he thereby acted in breach of his duty to remain impartial. Though the complainants challenge his impartiality they do not say they ever asked him to stand down.

The chairman has no vote save on matters of procedure and does not determine how the Committee is to report. So his commenting beforehand, at the President's request, on the proposals that had been put to the Committee afforded no grounds for questioning his fitness to chair it. And his being also the head of the legal service was helpful to the Committee. The complainants see bias in his saying at its 92nd meeting that he wanted to confine its debate to point-by-point scrutiny of the proposals on the grounds that it had already had a general debate at its 91st meeting. Yet the mere wish to go ahead in that way affords no grounds for declaring him unfit to chair the Committee and the complainants offer no other specific grounds for doing so.

The conclusion is that his chairmanship was not challengeable and constitutes no procedural flaw.

10. The complainants say that the EPO let them have scant information about its proposals, which were in part faulty through being poorly thought out and in breach of general principles of law.

The purpose of consultations is indeed to shed light on any such defects, but not to allow objections on the grounds that the proposals have been poorly drafted. Poor preparation may warrant delaying discussion or rejecting the proposals, but the GAC may not refuse to report at all on the grounds that it has not had enough information from the Administration.

So the complainants are mistaken in pleading the Administration's failure to prepare the proposals more thoroughly, hold wider consultations with third parties and provide fuller background information such as legal opinions, consultation of other organisations or discussion with governments of member States about the protection of contract staff.

11. The complainants plead breach of their rights in the Organisation's failure to consult them on several issues they see as essential, namely compliance with the European Patent Convention (EPC), with Article 20 of the Protocol on Privileges and Immunities and with the Council's decision of 20 October 1977 on Articles 14 and 16 of the Protocol on Privileges and Immunities, and the scope of the conditions of service of contract staff.

Yet those are not material issues. What Article 38 of the Service Regulations requires is that the Administration put such proposals to the GAC for an opinion. Since it did so, the Committee was free to state any objections it had and indeed it stated them either in its debate or in its report.

So the Committee had ample opportunity to debate the issues to which the complainants are referring.

12. They submit that they never received the detailed studies that the Committee needed to make up its mind.

The Committee's chairman was, as has been said, the head of the legal department and it was he who explained the legal basis for the proposals. For the reasons set out in 18 to 21 below in answer to the complainants' objections to the substance of the decision, the legal issues were not so difficult as to require any advice from outside lawyers. At the two lengthy meetings the Committee devoted to the proposals, one on general issues and the other on particular points, the chairman was indisputably able to give it the information it needed.

13. The complainants submit that the President of the Office set no deadline for the Committee's report, there being no written evidence on that score. But the Tribunal is satisfied on the evidence that successive time limits were expressly set for the Committee. The plea is mistaken in fact.

14. The complainants see another procedural flaw in the Administration's failure to send the proposals as amended by the Administrative Council back to the GAC. That, they say, offended against Article 38 of the Service Regulations.

Article 38 does not expressly require further consultation if proposals are amended after the Committee has reported. The purpose of the rule therein is such that the need for further consultation would be understandable if the proposals had been so radically amended as to be really new ones. In this case they were not. The amendments the Administration made in the text took account of the comments and suggestions made by the GAC and the changes concerned points on which the Committee had already given its views. So there was nothing new about the amended version. Besides, the changes that the Administration put to the Administrative Council followed the drift of the staff's own proposals: limiting to 5 per cent instead of 10 the proportion of contract staff to permanent employees and saying just when the EPO would be taking on contract staff, so that there should be little or no competition from such staff. Since the amendments reflected the staff's comments and concerns, the text raised no issue that had not already been debated. Staff representatives attend the Administrative Council's meetings, too, and are free to put their views to it. The complainants do not suggest that the EPO prevented them from doing so on this occasion.

Their plea again fails.

15. Their main objection is that the Committee's members did not get enough information to be able to report properly.

That issue is one of fact. There was nothing new about the idea of having contract staff. Indeed Article 33(2)(b) of the European Patent Convention contemplates it. The Council rejected in 1985 and 1986 proposals for that purpose that the GAC had been consulted on beforehand. The permanent employees were worried about the idea at the time. They are represented at various stages in the procedure for introducing a new category of staff. They sit on an informal body known as "Prestacom", a meeting of the President and the chairmen of the staff committees; on the joint GAC; and on the Budget and Finance Committee and the Administrative Council, though there they have no voting rights. In this case the staff representatives played an active part in all those bodies. The President spoke of the subject and explained the purpose at the Prestacom meeting on 29 April 1992 which two members of the GAC, Mr. Cervantes and Mr. Raths, attended. On 26 June 1992 he sent the Committee's chairman a draft text consisting of 17 articles and asked for an opinion. The members got copies on 6 July 1992. Contrary to what the Appeals Committee said the text was complete. The chairman of the GAC said so and the minutes of the Committee's meetings do not record any reservations on that score. The draft was first discussed at the Prestacom meeting of 8 July 1992. The participants had received the draft two days earlier and there was not much discussion. As before, the staff representatives were opposed. The main item on the agenda on the Committee's 91st meeting, held from 27 to 29 July 1992, was the proposals about contract staff. There was a wide-ranging discussion of the general issues in which representatives of the Administration explained why they were in favour while the staff representatives expressed doubt or opposition. At the end of the debate it was suggested that Prestacom should look into the issues of policy "to ensure that there would be enough time left to deal with the proposed decision itself". It was agreed to set aside the second week of September for further deliberation. On 10 August 1992 the chairman of the Central Staff Committee, Mr. Bousquet, who was not a member of the GAC, wrote to ask the President on what jobs the Office intended to be employing contract staff and what the practice was elsewhere. The President's reply of 3 September 1992 said that those questions could be answered orally and that the proposals should go to the Administrative Council at its session of December 1992. The proposals were the main theme of the Committee's 92nd meeting, which it held from 7 to 10 September 1992. It then had before it a version with some drafting changes. The staff representatives were sorry to get no answers to their questions and to have had no prior meeting of Prestacom to talk of the issues of policy; they said they were unable to give "a reasoned opinion" and that a "compromise" could be reached only if it were plainly stated just when contract staff might be recruited and what sort of jobs they would be doing. The staff representatives had reservations about taking part in the discussion of the proposals. There was review of the text point by point and many amendments were proposed, approved by the Committee and endorsed by the President. But the staff representatives refused to give their opinion on the grounds that they felt unable to do so. So the chairman put a report to the President summing up the Committee's proceedings, setting out proposed amendments and passing on the staff representatives' reasons for feeling unable to comment. The report cited the statement by the Administration's representatives that the staff representatives' questions had been answered and that the Committee had had time enough at its 91st meeting to study the matter. Discussion between staff representatives and management continued at the meeting that the Budget and Finance Committee held from 2 to 6 November 1992 and at the meeting the Council held from 8 to 11 December. The Staff Committee submitted its views and material information to the Council. To allay the fears of the staff the President offered to reduce from 10 to 5 per cent of the total number of EPO staff the maximum allowable number of contract staff, identify in Article 1(2) of the proposals the jobs for which contract staff might be recruited and limit the maximum duration of such appointments.

The Administration provided the GAC with the information it needed to give an opinion. There is no doubt that the chairman, as head of the legal department, was able to give the members the explanations they needed. The Administration did not need to seek opinions from lawyers or other experts on matters that the staff were fully able to grasp and solve on their own. The substantive amendments that the staff wanted did not call for further information and did not warrant withholding the Committee's opinion.

The conclusion is that the total period of time that the GAC had in which to give its opinion — some two months, including two meetings lasting several days each — was quite sufficient. Although proposals of such importance to the EPO called for careful study, the President had a legitimate wish to settle the matter promptly.

16. The complainants take the Organisation to task — sometimes the President, sometimes the Council — for the failure to take the separate decision, which the President had announced, saying in what circumstances contract staff might be appointed. That they see as breach of a promise to the staff.

The EPO denies the charge, pointing out that the President made his statement at the meeting of the Council, which only afterwards decided to add Article 1(2) to the draft. That provision lays down, in keeping with the President's promise, the conditions under which contract staff may be recruited.

Paragraphs 225, 235 and 237 of the minutes of the Council's meeting bear out the Organisation's contention. But even if the complainants' plea had been sound on the facts there would have been no flaw in the consultation procedure or in the substance of the impugned decision: since the alleged omission would be subsequent to that decision it could not invalidate it. The plea is devoid of merit.

*The substance of the decision*

17. The complainants' objections to the substance of the Council's decision are much the same as the ones already entertained: they say there was breach of their right to a hearing because the Administration failed both to consult the staff and to give them the information they had asked for and needed.

18. First, they object to what they see as conflict between the Service Regulations and the conditions of service of contract staff in that some provisions of the Service Regulations apply directly or by analogy to contract staff as well, namely the provisions on the pension and health funds and on staff representation. That, they submit, offends against general principles of law and may prove discriminatory. They plead breach of Articles 33(2)(b) and (c) of the European Patent Convention, which call for quite separate treatment of the two categories of staff.

Article 33 of the Convention, which is about the Administrative Council's competence, contains the following provisions:

> "(2) The Administrative Council shall be competent, in conformity with this Convention, to adopt or amend the following provisions:
>
> (...)
>
> (b) the Service Regulations for permanent employees and the conditions of employment of other employees of the European Patent Office, the salary scales of the said permanent and other employees, and also the nature, and rules for the grant, of any supplementary benefits;
>
> (c) the Pension Scheme Regulations and any appropriate increases in existing pensions to correspond to increases in salaries;"

Those provisions empower the Council to make or amend rules on conditions of service of permanent employees and of other staff. They set no restriction on the Council's authority that would require it to draw an unqualified distinction between the two categories of staff provided that the rules take account of the different nature of their duties. The Council complied with that requirement.

19. The complainants contend that the conditions of service of contract staff are contrary to the spirit of the Convention in that they seriously undermine the status of the permanent employees, particularly in the performance of the "sovereign duties" vested in such staff by the contracting parties.

Article 33(2)(b) of the Convention affords the basis in law for making rules on contract staff. The version approved by the Council limits recruitment of such staff in number and in the nature of their duties: they are to account for no more than one-twentieth of the work force, to serve for up to five years or exceptionally seven, make up for a temporary shortage of staff or perform occasional and non-permanent duties or be employed for such other reasons as may warrant limiting the length of the appointment. At the time when the rules were being adopted there was no reason to assume that the Administration would misapply them to the detriment of permanent employees. Nor do they impair the career prospects of such employees.

20. The complainants submit that the new conditions of service are at odds with a decision that the Council adopted on 20 October 1977 about permanent employees in pursuance of Articles 14 to 16 of the Protocol on Privileges and Immunities.

But the plea betrays misunderstanding of the relative status of rules and the precept that only the authority that adopted a rule may withdraw it: as the competent authority the Council was free to repeal or derogate from any rule it had itself made.

21. The complainants submit that membership of the pension fund and collective health insurance scheme should not be open to contract staff as it is to permanent employees and that the two categories should be kept distinct in those respects. What they fear is that contract staff may derive proportionally greater benefits for themselves from the pension and health funds and that permanent employees may have to bear a heavier and unwarranted burden of the cost.

The EPO demurs. It points out, for example, that very few contract staff would ever be drawing pensions since to qualify they would have to have a total of at least ten years' service. Before ten years are up they will ordinarily have become permanent employees. And those who leave before the ten years are up will merely withdraw lump-sum benefits with interest. What is more, contract staff have the option of keeping membership of any retirement fund they belonged to in their own country before joining the EPO. As for health insurance, contract staff are younger and less likely to fall ill, so that the interests of permanent employees should not suffer from their participation in the scheme. In any event the EPO says that if it did emerge later that their interests were suffering it would review the rules so as to ensure equal treatment between the two categories.

The principle of equal treatment means that an organisation may not treat differently officials who are in like case. It does not mean that an organisation may not amend its rules short of breach of an acquired right: see Judgments 832 (*in re* Ayoub and others), 986 (*in re* Ayoub No. 2 and others), 1368 (*in re* Aymon and others), 1514 (*in re* Aymon No. 2 and others) and 1515 (*in re* Antoinet No. 3 and others).

Neither the breach of equality that the complainants are alleging, which is merely academic, nor any breach of their acquired rights is established. Their plea is particularly implausible in that the disputed measure offers membership of a common scheme and there is no reason to fear improper application of it when the EPO professes willingness to revise it if it proves discriminatory against permanent employees. For the time being, therefore, there is no objection to allowing both categories of staff to belong to a single scheme.

22. The complainants protest at the EPO's failure to distinguish between categories in the area of staff representation within the Organisation. There too they see impairment of the permanent employees' interests: since contract staff

cannot have the same interests, having only fixed-term appointments, there is a risk of their being constrained in dealings with the Administration and having no stake in safeguarding staff interests. A special danger they see is that because of the absence of many contract staff it may prove difficult to reach the quorum required at meetings to appoint staff representatives, particularly at the smaller duty stations — Berlin and Vienna — where the proportion of contract staff is rather high.

The EPO retorts that in international organisations it is common not to have different staff representatives for different categories of staff; that the staff bodies are quite able to represent contract staff too; that such staff are likely to be quite able and willing to take an interest in representation of the staff; and that if any serious difficulties arose over representation the rules would of course be changed.

The complainants' misgivings are again merely academic. For the same reasons as those stated above the conclusion must be that at present there is no evidence of any breach of equal treatment of the acquired rights of permanent employees.

23. The complainants argue that the new rules limit the rights of the staff to be represented in the recruitment of contract staff.

The EPO concedes the truth of the point for short-term appointments: the procedure must be simpler for recruiting contract staff than for recruiting permanent employees. Yet at its office in Munich — it observes — when appointments are extended to a total of over three years the procedure requires consultation of the staff. Since such decisions are published, staff representatives may make their views known.

The Organisation is plainly mindful of the need to keep staff representatives informed and to consult them, even though it may quite properly apply different sets of rules for the recruitment of permanent employees and contract staff.

24. The complainants submit that contract staff themselves are poorly treated in that the new rules do not afford them the same safeguards as does the municipal law which is applicable in the absence of a system of collective international agreements and in that they have no entitlement to end-of-service redundancy or unemployment benefits. Those omissions, the complainants say, offend against the dignity of the international civil service and so affect themselves adversely.

For one thing, it is doubtful whether the complainants have sustained actionable injury. Besides, their objections are devoid of merit.

They charge the EPO with infringing Article 20 of the Protocol on Privileges and Immunities by adopting international rules that are wholly or in part in breach of the national labour law that would otherwise apply and which it is thereby trying to evade. Article 20(1) reads:

> "The Organisation shall co-operate at all times with the competent authorities of the Contracting States in order to facilitate the proper administration of justice to ensure the observance of police regulations and regulations concerning public health, labour inspection or other similar national legislation, and to prevent any abuse of the privileges, immunities and facilities provided for in this Protocol. ..."

The EPO's answer is that the article speaks not of municipal law on contracts of employment — in particular the possibility of granting fixed-term appointments — but of such law on matters of public health and labour inspection.

The law of employment in the international civil service is governed foremost by the rules of the international organisation. Such an organisation might evade or infringe municipal law only if it governed relations between organisation and staff. The complainants do not seek to show that it does.

Besides, the EPO observes that it is common practice for international organisations to grant fixed-term appointments. All the Tribunal need say on that score is that there is no general principle of the international civil service which requires an organisation to confer only permanent appointments.

The plea fails.

25. The complainants submit that the new rules are harsh in failing to provide redundancy and other end-of-service entitlements.

The Organisation does not deny that but says that it so warns contract staff, who may take out individual insurance if they wish.

It may be a pity that contract staff do not enjoy the same degree of protection as the unemployed under municipal law. But the fact that they do not affords no grounds for setting aside the rules applicable to such staff. On that score too their position is subject to change, either by agreement with member States or by amendment of the Organisation's own rules.

Again the plea cannot be sustained.

## DECISION

For the above reasons,

The complaints are dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Michel Gentot, Vice-President, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 30 January 1997.

*(Signed)*

WILLIAM DOUGLAS MICHEL GENTOT EGLI

A.B. GARDNER

***Registry's translation,***
***the French text alone***
***being authoritative.***

## EIGHTY-SECOND SESSION

***In re* Ansorge**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Miss Helga Ansorge against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 23 April 1996 and Eurocontrol's reply of 30 July 1996;

Considering that by a letter of 25 July 1996 the complainant informed the Registrar of the Tribunal that she wished to withdraw suit;

Considering that by a letter of 12 August 1996 the Agency informed the Registrar that it had no objection to the withdrawal of suit;

Considering that suit is unreservedly withdrawn;

## DECISION

The withdrawal of suit is hereby recorded.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Michel Gentot, Vice-President, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 30 January 1997.

*(Signed)*

WILLIAM DOUGLAS MICHEL GENTOT EGLI

A.B. GARDNER

Organisation internationale du Travail
*Tribunal administratif*

International Labour Organization
*Administrative Tribunal*

## EIGHTY-SECOND SESSION

***In re* Cook (Nos. 5 and 6)**

THE ADMINISTRATIVE TRIBUNAL,

Considering the fifth and sixth complaints filed by Mr. Steven Derek Cook against the European Patent Organisation (EPO) on 28 November 1995 and the EPO's replies of 16 February 1996;

Considering that by a letter of 11 May 1996 the complainant informed the Registrar of the Tribunal that he wished to withdraw suit;

Considering that in comments of 4 June 1996 the Organisation informed the Registrar that it had no objection to the withdrawal of suit;

Considering that suit is unreservedly withdrawn;

## DECISION

The withdrawal of suit is hereby recorded.

**In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Michel Gentot, Vice-President, and Mr. Edilbert Razafindralambo, Judge, sign below, as do I, Allan Gardner, Registrar.**

**Delivered in public in Geneva on 30 January 1997.**

Wm Douglas

**WILLIAM DOUGLAS**

**MICHEL GENTOT**

**E. RAZAFINDRALAMBO**

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

**A.B. GARDNER**

Organisation internationale du Travail
*Tribunal administratif*

International Labour Organization
*Administrative Tribunal*

***Registry's translation,***
***the French text alone***
***being authoritative.***

## EIGHTY-SECOND SESSION

***In re* Raths (No. 4)**

THE ADMINISTRATIVE TRIBUNAL,

Considering the fourth complaint filed by Mr. Gaston Raths against the European Patent Organisation (EPO) on 30 October 1995 and corrected on 8 March 1996;

Considering that by a fax of 28 May 1996 the complainant's counsel informed the Registrar of the Tribunal that the complainant wished to withdraw suit and that the Organisation, when invited by the Registrar to comment, declined to do so;

Considering that suit is unreservedly withdrawn;

## DECISION

The withdrawal of suit is hereby recorded.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Michel Gentot, Vice-President, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 30 January 1997.

*(Signed)*

WILLIAM DOUGLAS MICHEL GENTOT EGLI

A.B. GARDNER

## EIGHTY-SECOND SESSION

***In re* Saunders (No. 18)**

THE ADMINISTRATIVE TRIBUNAL,

Considering the eighteenth complaint filed by Mr. Yann Harris Saunders against the International Telecommunication Union (ITU) on 9 July 1996 and corrected on 17 July 1996;

Considering that by a letter of 21 September 1996 the complainant informed the Registrar of the Tribunal that he wished to withdraw suit and that the Union, when invited by the Registrar to comment, declined to do so;

Considering that suit is unreservedly withdrawn;

### DECISION

The withdrawal of suit is hereby recorded.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Michel Gentot, Vice-President, and Mr. Edilbert Razafindralambo, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 30 January 1997.

Wm Douglas

WILLIAM DOUGLAS

MICHEL GENTOT

E. RAZAFINDRALAMBO

A.B. Gardner

A.B. GARDNER

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE
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